Supreme Court, U.S.
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86-950

No. ____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

WINCHESTER AND WESTERN RAILROAD COMPANY, Appellant,

v.

COMMONWEALTH OF VIRGINIA and VIRGINIA STATE CORPORATION COMMISSION, DIVISION OF PUBLIC SERVICE TAXATION, Appellees.

ON APPEAL FROM THE SUPREME COURT
OF VIRGINIA

JURISDICTIONAL STATEMENT

FLOURNOY L. LARGENT, JR.
Attorney at Law
Post Office Box 808
Winchester, Virginia 22601
Counsel for Appellant
(703) 665-4378

November 26, 1986

EDITOR'S NOTE

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QUESTION PRESENTED

Whether the ad valorem tax imposed pursuant to Sections 58-515 and 58-524(5) of the Code of Virginia as in effect in 1980 and 1981, with respect to rail cars of a domestic Virginia railroad corporation solely operating track located in Virginia, violates the Commerce Clause of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when applied to rail cars which, during the year as to which the tax was applied, never entered Virginia and were regularly, habitually and continuously employed to ship freight from specified plants located in states other than Virginia.

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Note: The parent company of Appellant Winchester and Western Railroad Company is Unimin Corporation. Unimin Corporation is owned principally by S.C.R-Sibelco S.A. Affiliates of Appellant Winchester & Western Railroad Company are Tammsco, Inc., Unisil Corporation and Traiger Land and Timber Corporation.

JURISDICTIONAL STATEMENT

Winchester and Western Railroad Company, the Appellant, appealed from the final judgment of the Supreme Court of Virginia, by Memorandum of Opinion dated September 5, 1986, holding that Sections 58-515 and 58-524(5) of the Code of Virginia, as applied in this case, are not unconstitutional as being violative of Appellant's rights under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The Memorandum Opinion of the Supreme Court of Virginia dated September 5, 1986, which appears in the appendix hereto, p. 1a, infra, is not a reported opinion.

That opinion of the Supreme Court of Virginia affirmed an unreported opinion of the Virginia State Corporation Commission dated October 1, 1985, which appears in the appendix hereto, p. 7a, infra.

That opinion of the State Corporation Commission followed the remand of the case pursuant to an opinion of the Supreme Court of Virginia dated December 2, 1983, which appears in the appendix hereto, p. 27a,

infra, and which is reported at 226 Va. 352, 309 S.E.2d 590 (1983).

The 1983 opinion of the Supreme Court of Virginia reversed and remanded the unreported opinion and final order of the Virginia State Corporation Commission entered January 21, 1983, which appears in the appendix hereto, p. 51a, infra.

That opinion and final order followed a report of a Hearing Examiner for the Virginia State Corporation Commission filed on August 12, 1982, which appears in the appendix hereto, p. 87a, infra.

The report of Hearing Examiner followed Appellant Winchester and Western Railroad Company's Application for Review and Correction of Taxes filed with the Virginia State

Corporation Commission on August 10, 1981, which appears in the appendix hereto, p. 138a, infra, and Petitioner's More Definite Statement for Relief filed with the Virginia State Corporation Commission on April 5, 1982, which appears in the appendix hereto, p. 116a, infra.

JURISDICTION

The judgment of the Supreme Court of Virginia, affirming the state tax imposed upon Petitioner's rail cars and upholding the constitutionality of that tax, was entered by Memorandum Opinion on September 5, 1986. While that Memorandum Opinion was silent with respect to the Appellant's timely constitutional challenge, it affirmed

the imposition of the tax required by applicable state statutes. Effectively, this was a determination that the statutes as applied were valid notwithstanding the Constitutional objections.

A Notice of Appeal to this Court was timely filed in the Supreme Court of Virginia on November 24, 1986.

This Appeal is being docketed in this Court within 90 days from the date of the opinion of the Supreme Court of Virginia. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

Article I, Section 8:

> Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

Amendment XIV, Section 1:

> * * * nor shall any State deprive any person of life, liberty or property without due process of law * * *.

Code of Virginia:

> Sec. 58-515. * * * * The State tax on the rolling stock of railway companies doing business in this State shall be the rate of one dollar on each one hundred dollars of the assessed full value thereof * * *.

> Sec. 58-524. * * * * Every railroad company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the

county, city, town or magisterial district in which it is located. * * * *

The report shall classify such property under the following heads:

* * * *

(5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonable proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceeding, Appellant's Application for Review and Correction of Taxes which was the first document objecting to the tax statutes, Appellant raised the constitutional issues as follows:

8. Such tax is impermissible under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

Appellant's constitutional claims were set forth in its Memorandum of Law to the Hearing Examiner, which was presented to the Virginia State Corporation Commission following the report of the Hearing Examiner, by quoting from Marye, Auditor v. Balt. and Ohio Railroad, 127 U.S. 117 (1888), which relied on the Commerce Clause of the Constitution of the United States in striking down a state statute concerning taxation of rail cars. A portion of the quoted language is as follows:

> In such cases the tax might be fixed in an appraisement and valuation of the average amount of the property thus habitually used and collected

> by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case.

In that brief Appellant also quoted Union Tank Line Co. v. Wright, 249 U.S. 275 (1919), as follows:

> In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction although devoted to interstate commerce.

The constitutional claims were again reiterated in Appellant's brief to the Supreme Court of Virginia filed on July 15, 1983, by citation of

numerous cases concerning the constitutionality of taxation of items of transitory property under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. In addition to quoting the foregoing language from Marye, supra, citations included Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158 (1933); Gromer v. Standard Dredging Co., 244 U.S. 362 (1912); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); Union Refrigeragor Transit Co. v. Lynch, 177 U.S. 149 (1900); American Refrigeration Transit Co. v. Hall, 174 U.S. 70 (1899).

Once again, these constitutional issues were squarely raised in Appellant's 1986 brief submitted to the Supreme Court of Virginia. This brief argued:

> Under the commerce clause of the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution, it is unconstitutional to tax the 209 cars which never entered Virginia in 1980.

The brief cited Union Refrigerator Transit Co. v. Kentucky, supra, and Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962).

In its September 5, 1986 Memorandum Opinion, p.1a, infra, the Supreme Court of Virginia affirmed the October 1, 1985 order of the State Corporation Commission, p. 7a, infra, which upheld the constitutionally disputed state tax statute as applied. The September 5, 1986 Memorandum Opinion of the Supreme Court of Virginia did not comment upon the constitutional issues raised by Appellant.

STATEMENT OF THE CASE

The Appellant, Winchester and Western Railroad Company, a Virginia corporation, as of December 31, 1980, operated its railroad solely on 18 miles of track located entirely within Virginia. As of that date, the Appellant leased on a long-term basis 323 freight cars. During 1980, 209 of these 323 cars never entered Virginia. Most of these 209 cars were regularly assigned to carry freight from a designated one of three plants of Unimin Corporation, the Appellant's parent company, located in Illinois, Minnesota and New Jersey.

In 1981, the Virginia State Corporation Commission assessed tax with respect to 325 freight cars which the Appellant operated during 1980. After a hearing before a State Corporation Commission Hearing Examiner, and review by the State Corporation Commission, the State Corporation Commission ruled that 323 of the 325 cars were taxable, the 2 nontaxable cars being cars which were destroyed prior to December 31, 1980. See pp. 51a and 87a infra. The State Corporation Commission ruled that all 323 freight cars were taxable in Virginia, although 209 cars had not entered Virginia in 1980, the year to which the tax was applicable, and most of those cars were assigned to plants in one of the three specified states traveling routes presented in evidence,

on a freight car by freight car basis, to the Hearing Examiner.

The Supreme Court of Virginia, upon its review of the same record, held based upon statutory interpretation that the State Corporation Commission incorrectly found all 323 cars to be taxable. That Court further ruled that the proviso in Sec. 58-524(5) of the Code of Virginia, requiring railroads to report and be assessed on the average amount of rolling stock habitually used by them in Virginia, requires computation of the average amount of rolling stock, including rolling stock of other railroads, habitually used by the taxpayer railroad in Virginia. That court remanded the case to the Virginia State Corporation Commission for action consistent with its opinion.

By order dated October 1, 1985, the State Corporation Commission determined that the average amount of rolling stock, including cars of other rail carriers, habitually used by the Appellant in Virginia in 1980 exceeded 323 cars, thus requiring that the number of the Appellant's freight cars subject to ad valorem tax in Virginia be 323 cars. See p. 7a, infra. The cars of other railroads included in the calculation of average amount of rolling stock habitually used in Virginia were included in Virginia's calculation of assessment of ad valorem tax against other railroads. The Supreme Court of Virginia affirmed this decision in its Memorandum Opinion dated September 5, 1986. See p. 1a, infra.

Appellant's position, supported by evidence of record showing routes traveled throughout the year 1980 on a car by car basis, is that since most of the 209 freight cars which never entered Virginia in 1980 were regularly, habitually and continuously used in a specified one of three states, Illinois, Minnesota or New Jersey, for shipment of freight produced in those states, those states had the constitutional power to impose ad valorem tax on those cars. Consequently, Virginia's imposition of an ad valorem tax on those freight cars violates the Commerce Clause of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The

cars of other railroads included in the calculation of average amount of rolling stock habitually used in Virginia were included in Virginia's calculation of assessment of ad valorem tax against other railroads.

THE QUESTION IS SUBSTANTIAL

The application of ad valorem taxation to rail cars based upon the average number of cars habitually used on the taxpayer railroad's line is a common form of taxation within the several states. The State of Virginia concedes that the maximum number of freight cars as to which the Appellant can be required to pay an ad valorem tax is Appellant's 323 freight cars. However, in disregarding the fact that

a substantial number of these cars never entered the State of Virginia, and were used regularly, habitually and continuously in one of three other states, the State of Virginia would subject Appellant to an unconstitutional possibility of double taxation.

The fact that the average amount of rolling stock used on Appellant's line within Virginia, including cars of other rail carriers otherwise subject to tax, exceeded 323 cars, in no way limits the power of the three other applicable states to impose double ad valorem taxation on the respective cars based in those states.

This Court has long recognized that rolling stock not located in the state of the corporate owner's domicile cannot be taxed in the state of

domicile. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905). This Court further held that the taxpayer need not establish that its rail cars were in fact subject to tax in other states in order to render a tax imposed by the state of domicile constitutionally repugnant; the taxpayer railroad need only show that another state could constitutionally impose a tax on the applicable railroad cars. Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962).

Nevertheless, in direct contradiction of this Court in Central Railroad Co., supra, the Supreme Court of Virginia held in this case that rail cars must actually be subject to taxation in another state in order to

render them nontaxable in Virginia. That court decided as follows:

> As the Commission concedes, an intrastate railroad may rebut the presumption that all its cars are habitually used in Virginia by showing that some have established a tax base elsewhere. This rebuttal evidence is not available in the present case because none of the Railway's cars is subject to taxation outside Virginia. (Emphasis supplied)

Winchester and Western Railroad Co., supra, 226 Va. at 360, 309 S.E. at 595, Appendix p. 48a, infra.

In accordance with past decisions of this Court, the States of Illinois, Minnesota and New Jersey could have constitutionally imposed a tax on some of Appellant's 323 freight cars. See Braniff Airways v. Nebraska Board, 347 U.S. 590 (1954); Ott v. Mississippi Barge Line Co., 336 U.S. 169 (1949).

Consequently, the rail cars which could have been taxed by Illinois, Minnesota and New Jersey cannot constitutionally be taxed by Virginia.

This case presents this Court with a new issue not addressed in this Court's prior cases concerning state ad valorem taxation of transitory personal property. Where the state of corporate domicile justifies its taxation of rail cars based upon the average amount of rolling stock habitually used in the state, including cars of other rail carriers used on the taxpayer railroad's line rather than solely the taxpayer railroad's cars, does the well established rule that the state of domicile cannot tax a rail car regularly, continuously and habitually used in a specified other state become inapplicable?

In light of the common practice of imposing rail car ad valorem tax in a fashion similar to the State of Virginia, this is a constitutional issue of substantial importance.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

FLOURNOY L. LARGENT, JR.
Post Office Box 808
Winchester, VA 22601
(703) 665-4378
Counsel for Appellant

November 26, 1986

C E R T I F I C A T E

I do hereby certify that true and correct copies of the Jurisdictional Statement were mailed to Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219; Kenneth W. Thorson, Assistant Attorney General, Supreme Court Building, Richmond, Virginia 23219 and Lewis S. Minter, Esquire, State Corporation Commission, P. O. Box 1197, Richmond, Virginia 23209, in accordance with the rules of the Supreme Court of the United States, this 4th day of December, 1986.

Flourney L. Largent, Jr.

APPENDIX

SUPREME COURT OF VIRGINIA

Present: All the Justices

WINCHESTER AND WESTERN
RAILROAD COMPANY

v. Record No. 860055

COMMONWEALTH OF VIRGINIA AND
STATE CORPORATION COMMISSION

MEMORANDUM
OPINION*
9-5-86

FROM THE STATE CORPORATION
COMMISSION OF VIRGINIA

This case is before the Court for a second time on Winchester and Western Railroad Company's (the Railway) appeal of right from an adverse ruling by the State Corporation Commission concerning the December 31, 1980 assessment of the

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*This opinion is not for publication and is not to be cited or relied upon as precedent in the future.

Railway's rolling stock. We first considered this dispute in W. & W. Ry. Co. v. Commonwealth, 226 Va. 352, 309 S.E.2d 590 (1983).

The facts are the same. The Railway is a Virginia corporation. All of its 18 miles of track lie in Virginia between Gore and Winchester. In 1980, the Railway owned or leased 325 rail cars, none of which was subject to taxation in any state other than Virginia, 42 were used for not more than two months, 14 were used from two to six months, and 60 were used for more than six months. Further, two cars were destroyed prior to December 31, 1980. The Commission assessed 323 cars at $9,818,128.

In the first appeal, the Railway contended that the Commission assessed

more cars than it should have. According to the Railway, it could be taxed only on rail cars habitually used in Virginia and only the 60 rail cars used for more than six months so qualified. The Commission arrived at the number of rail cars to be assessed by applying a presumption to the effect than "an intrastate railroad has only enough cars to render its public service in Virginia and that it is habitually using all its own cars for that purpose." 226 Va. at 359, 309 S.E.2d at 595.

In the first appeal, we rejected the Railway's approach to determining which cars were habitually used in the Commonwealth. Further, we upheld the presumption relied upon by the Commission. However, we said that

presumption was rebuttable.

We stated that the presumption could be rebutted in only two ways: first, by showing that the rail cars had established a tax base elsewhere; second, "by showing that the average amount of rolling stock habitually used by [the Railway] in Virginia, including cars of other railroads, [was] less than the total amount of its rolling stock." Id. at 360, 309 S.E.2d at 595. With regard to the first method of rebutting the presumption, we said it could not be relied on in the instant case because it was plain from the record that none of the Railway's cars was subject to taxation outside Virginia. Consequently, we remanded the case for the sole purpose of permitting the Railway to attempt to

rebut the presumption by using the second alternative set forth above.

On remand, the Railway sought to rebut the presumption relied upon by the Commission by advancing two calculations which purportedly showed that the number of cars habitually used in Virginia was less than 323. The Commission rejected the calculations advanced by the railroad on the grounds that they were either the product of faulty reasoning or that they did not consider all the facts. It would serve no useful purpose to restate here the analysis made by the Commission. Suffice it to say that upon our review of the record, we conclude that the Commission correctly ruled that the Railway failed to rebut the presumption. Therefore, we will affirm

the Commission's decision.

Affirmed.

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Petition of

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST810005

For review and correction of tax assessment pursuant to Virginia Code Section 58-672

October 1, 1985

Opinion, SHANNON, Chairman:

This case is again before the Commission following its appeal to the Supreme Court of Virginia. By its mandate, dated December 2, 1983, accompanied by its opinion[1] of even date, the case was remanded "for future proceedings consistent with the views

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[1] Winchester and Western Railroad Company v. Commonwealth of Virginia, et al., 226 Va. 352.

expressed in the written opinion of this Court."

The appellant in the Supreme Court, and the petitioner now before us is the Winchester and Western Railroad Company (hereinafter "W&W" or "Company"). The proceeding originated with an application by W&W for review and correction of taxes on Company's rolling stock which was assessed by Commission order dated May 20, 1981. Following our order of January 21, 1983, in which a small correction to the assessment was made, but which otherwise denied relief, W&W appealed as of right to the Supreme Court of Virginia.

The case before the Supreme Court appears to have turned upon two presumptions, one which had been

exposed by the Commission in administering the provisions of Virginia Code Sec. 58-524(5), and another ancillary presumption defined by the Court.

As described by the Court on page 359 in its opinion:

> There is a basic presumption, the Commission argues, that an intrastate railroad has only enough cars to render its public service in Virginia and that it is habitually using all its own cars for that purpose. We agree that this is a reasonable presumption. We also agree that the Commission may reasonably presume that to the extent an intrastate railroad does not use its own cars in Virginia, it uses cars of other railroads which are in effect substitutes for its own. These presumptions, however, are rebuttable. Perhaps, as the Commission maintains, there was no legislative intent to change the substantive law by the 1972 amendment to the statute. Nevertheless, in its present form, the statute,

> regardless of intent, unequivocally mandates assessment on the average amount of rolling stock habitually used in Virginia, and the statute is controlling. However reasonable may be the Commission's presumptions, they may be rebutted when the assessment is challenged.

The Commission's previous opinion in this case recognizes that the railroad may rebut the presumption that it owns (or leases) only enough rolling stock to satisfy its needs. Realizing that most of the cars of all interstate railroads are continually in interchange with foreign lines, the presumption further treats the use of all foreign line cars as substitutes for the railroads' own rolling stock. Of course, the use of the foreign cars is a fact of railroad operations - not, in itself, a presumption. The Court, however, questions whether, in taxing

rolling stock, we can presume that the number of foreign cars used over the line of this intrastate railroad is sufficient, when added to the number of W&W cars used, to at least equal the total amount of W&W rolling stock. The Court appears to conclude that the taxpayer may show - if it can - that the "average" number of cars "habitually used" in Virginia is less than its total fleet. In which case, the tax would be applied to ratably less than one hundred percent of W&W depreciated rolling stock value.

At the outset, in trying to apply the decision of the Virginia Supreme Court to the facts of this case, we feel compelled to consider the meaning of the clause "average amount of rolling stock habitually used . . . in

this State," which is the language of the controlling code provision, Section 56-524(5). It does not appear rationally possible to resolve this matter without a clear determination of that meaning.

The foregoing language is recognized by the Virginia Court as probably traceable to the opinion of the United States Supreme Court in Marye v. Baltimore and Ohio Railway, 127 U.S. 117, 123-124 (1888). The purpose of the language, described by our Court as dicta, most certainly was to enunciate a formula for the taxing of railroad rolling stock by an individual state "even if the individual items were constantly changing." The U.S. Supreme Court volunteered that, ". . . the tax might

be fixed by an appraisement and valuation of the average amount of the property thus habitually used . . .." (emphasis added) Id. at 123-24.

It was, and is, legally necessary to establish some sort of proration of an interstate railroad's taxable rolling stock in order to accommodate the federal constitutional limitation protecting interstate commerce from unreasonable burdening.

For many years, this Commission has, in fact, prorated the railroad rolling stock tax on the basis of car miles operated within Virginia and, in the case of multi-state lines, the car miles operated over the lines of the taxpayer living outside of the state. Realizing that the taxable items were constantly changing, individual car

identification has been irrelevant. However, the "average number of cars" has been determined on the basis of the ratio of car miles traveled in Virginia to total system car miles (tract mileage in the case of some small lines). In the case of W&W, as previously determined, the "average number of cars" was 100 percent since the W&W owns no trackage outside of Virginia. However, as we understand the Court's ruling, the foregoing ratio methodology is not necessarily acceptable in arriving at an average number of cars used in Virginia for this intrastate line.

With regard to the term "habitually," it seems to us that once the "average amount" of rolling stock is determined, the cars being so used

must necessarily be deemed to be "habitually used." If a railroad company is conducting continuous operations in this state, those operations would be "habitual." As characterized by our Court's opinion, "The word 'habitually' has been defined as 'customarily.'" The ongoing, continuous implications of the term - as opposed to a sporadic operation - appear to be reflected in the language of the dicta in the Marye opinion, above. The U.S. Supreme Court clearly recognized that the term did not require specific cars to be in continuous use, but that rolling stock could be "habitually used" even "if the individual items were constantly changing." It appears to be the movement of cars, per se, that must be

continuous or habitual. One can't be said to be habitually using an item which is constantly being exchanged for another. It is the use of such like items that become habitual.

In the present case, the W&W was engaged during the period in question in an ongoing, continuous, intrastate and interstate railroad operation. We conclude that all cars used by it in those operations were "habitually used" in this State within the meaning of the statute.

Before reaching our conclusion we have thoroughly explored the logic of the two different methods which have been proposed by W&W in an effort to rebut the presumption that all W&W rolling stock was habitually used in Virginia during 1980. These methods

were contained in a Petition filed for the purpose of rebutting the presumption as set forth in the opinion of the Virginia Supreme Court.

The first method was intended to calculate the minimum number of cars which might have been used to ship the product of Unimin Corporation (W&W's parent company) between Gore and Winchester, Virginia. Applying this test, W&W calculates that a pool of 195 cars could have made these shipments. Railway then indentifies the specific cars it would place in that pool by listing the 195 cars with the greatest number of hours spent on its line. Fifty-four of those cars belonged to the petitioner and the remaining 141 cars were shown to be cars owned by Chessie System Railroads - C&O or B&O.

W&W recognizes that it has previously conceded that 60 of its cars, not the 54 identified above, should be considered to have been "habitually used" during the 1980 taxable year. Therefore, Railway concludes that the correct, average number of cars, foreign line and company-owned, which were habitually used in 1980 amounts to 201 cars - the sum of 60 W&W cars and 141 foreign line cars.

The inherent fallacy in the foregoing is apparent. The method does no more than show the minimum number of cars which would have been required if each car made 16 trips. In fact, Exhibit No. 7 filed by W&W during the Commission proceeding shows that 3,055 cars were used in Virginia over petitioner's line.

The objective, of course, is to determine the number (average) of cars used by the taxpayer - not the minimum number of cars in a fixed pool which could have been used.

Petitioner's second proposed method to rebut the presumption in issue is to work from a list of some 270 cars supplied to W&W by Chessie System during the tax year. These were by no means all of the foreign cars moving over the W&W. From the aforesaid list, in a manner described in Company's Petition, W&W calculated that the "average" number of Chessie cars assigned during the period was 170, or 100 less than the number of individual cars actually used. The 170 cars were added to the 60 cars which the company "concedes" were habitually used during

the year, for a total of 230 cars. That figure, according to method number two, is the average number of cars habitually used.

As set forth above, we have determined that each car used on W&W as part of its "continuous" or "customary" operations must necessarily be classified as "habitually used." Therefore, one defect in the foregoing calculation is the failure to include all foreign line cars moving over W&W, as well as the failure to include all W&W cars used. The Company's testimony shows that there were 114 different W&W cars so used; Exhibit No. 7, filed in the case, lists waybills showing 102 different cars.

Petitioner expresses a preference for the first proposed methodology set

out above.

Finally, W&W seeks for the first time to apply the "presumption of taxability" (applicable only to the taxpayer's cars) to the foreign line cars operated over W&W. After concluding that all of the Chessie cars used during 1980 were subject to state railroad taxation, Company argues that it, therefore, ". . . has properly rebutted the presumption as to taxability with respect to the one hundred forty-one (141) Chessie cars habitually used by the Railway." Therefore says Company, only the sixty cars which it "concedes" to have been "habitually used" were properly subject to taxation.

It is true that a proration of all Chessie System cars was taxed to

Chessie - not to W&W. However, the movement over any line other than Chessie by a Chessie car is not included in calculating the ratio of Chessie cars which were taxed. No double taxation of Chessie cars has occurred. The rolling stock tax applies to the owner (or long-term lessee) of all railroads operating in Virginia and is predicated only on the depreciated value of such cars. Whether state taxes have been paid on any foreign line car operating over the lines of a Virginia railroad is not relevant to the latter's liability for the tax. The only two ameliorating factors to this liability have been identified by the Virginia Supreme Court and addressed above.

Since W&W has challenged the

apportioning process used to determine the average number of cars used by W&W during 1980, we shall employ a different approach which places no reliance upon either presumption herein considered. Our objective is to determine, by some rational means, whether the average amount of rolling stock used in Virginia - including all foreign line cars - is less than the total amount of W&W's rolling stock. In arriving at this, we are not concerned with the minimum number of specific cars which could have handled the total shipments over the line. Nor are we concerned with the length of stay in the state nor with the number of times a particular car was used. We are only concerned, as said the U.S. Supreme Court, with the total number of

cars "habitually used" - "even if the individual items were constantly changing."

The following information has been lifted from Exhibit 7, filed by W&W during the proceeding before this Commission:

1. 3,055 cars moved over W&W in Virginia per waybills.

2. 671 W&W cars likewise moved per waybills.

3. 102 different W&W cars were likewise moved per waybills.

It is our conclusion that we can establish by the following formula the average amount of rolling stock used in this state during 1980 - consisting of both foreign and W&W cars.

A_t = Average number of cars used in Va. during the tax year t.

S_t = Total number of waybills in year t for all cars.

W_t = W&W cars used in Va. during year t.

WS_t = Total W&W waybills in year t.

$A_t = S_t \times W_t/WS_t$

$A_t = 3,055 \times 102/671$

$A_t = 464$ cars

Of course, the average number of cars used in Virginia during the tax year exceeds the total number of cars comprising W&W's fleet. On this basis it is our conclusion that the prior assessment should stand.

For the reasons hereinabove set forth, we conclude that the Petitioner, W&W, has failed to show that the average amount of rolling stock habitually used during the taxable year, 1980, including cars of other

railroads, is less than the 323 cars comprising its entire fleet.

Therefore, it is hereby ORDERED that the final order heretofore entered in this proceeding, the order dated January 21, 1983, be, and the same is hereby CONFIRMED, resulting in a rolling stock tax assessment of $9,818,128.

It is further ORDERED that attested copies hereof be mailed to Flournoy L. Largent, Esquire, and John F. Anderson, Esquire, P.O. Box 444, Winchester, Virginia 22601; to Kenneth W. Thorson, Esquire, Office of the Attorney General of Virginia, 101 North 8th Street, 5th Floor, Richmond, Virginia 23219; and to the Commissioner's Division of Public Service Taxation.

WINCHESTER AND WESTERN RAIL COMPANY

v.

COMMONWEALTH of Virginia, et al.

Record No. 830492.

Supreme Court of Virginia

Dec. 2, 1983.

Before CARRICO, C.J., and COCHRAN, POFF, COMPTON, STEPHENSON, RUSSELL and THOMAS, JJ.

COCHRAN, Justice.

Pursuant to Code Sec. 58-672, Winchester and Western Railroad Company (the Railway) filed its application with the State Corporation Commission for review and correction of an assessment for taxation of rolling stock as of December 31, 1980. After the Commission denied the application

except for a minor adjustment in the assessment, the Railway filed its petition for appeal against the Commonwealth and the Commission.

Findings of fact, made by the Hearing Examiner and approved by the Commission, are not in dispute. The Railway, a Virginia corporation, operates a railroad located entirely within the boundaries of the Commonwealth; its track extends a distance of 18 miles from Gore to Winchester. The Railway is a wholly-owned subsidiary of Unimin Corporation, which ships sand from its Virginia plant at Gore and from its plants in other states. Prior to 1980, the Railway acquired by long-term lease its entire fleet of 325 freight cars, all of which bore the Railway's

markings during 1980. Of the 325 cars, 209 were never used in Virginia in 1980, 42 were used for not more than two months, 14 for two to six months, and 60 for more than six months. Two of the cars used in Virginia for less than six months were destroyed before December 31, 1980. None of the 325 cars was subject to taxation for 1980 in any state other than Virginia; the Commission assessed all the cars for taxation in Virginia for that year. The Commission did not assess other cars the Railway used in Virginia which did not bear the Railway's markings.

The Hearing Examiner concluded that assessment of 323 cars owned or operated by the Railway on December 31, 1980, was proper. After hearing argument on the Railway's exceptions to

the Hearing Examiner's report, the Commission, by opinion and order entered January 21, 1983, one member dissenting, approved the assessment of 323 cars. The Commission reduced the total assessment, however, from $9,876,122 to $8,818,128, by deleting the assessed value of the two destroyed cars.

The assessment of rolling stock, mandated by Code Sec. 58-529 (Repl.Vol.1974), is based upon the annual report required by Code Sec. 58-524 (Repl.Vol.1974), which provides in pertinent part as follows:

> Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the

> county, city, town or magisterial district in which it is located ....
>
> The report shall classify such property under the following heads:
>
> * * * * * *
>
> (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State;
>
> * * * * * *

The Railway argues, as it did before the Commission, that this statutory language is clear and controlling and that it limits the assessment of rolling stock to the 60 cars used for six months or more in Virginia in 1980. These were the only

cars, the Railway says, that were "habitually used" in Virginia within the meaning of the statute.

The Commission relies upon its longstanding methodology for determining the rolling stock assessable for taxation in Virginia. By Administrative Order entered May 25, 1928, the Commission established the method for determining such assessable rolling stock. As to freight cars, the order provided in pertinent part as follows:

(a) All freight train cars (except caboose cars) shall be apportioned, apportioning to the State of Virginia that proportion which the car miles made by such equipment in Virginia is of the car miles made by such equipment on the entire system.

Using that methodology, the Commission's opinion stated that the Railway, operating only in Virginia, could only report intrastate car miles; therefore, the percentage to be applied to the rolling stock was 100%.

The Railway contends that the 1972 amendment to Code Sec. 58-524 (Acts 1972, c. 813) changed the applicable law; for the first time, the law put intrastate railroads on the same basis as interstate railroads, which could be taxed only on rolling stock "habitually used" in Virginia. The Commission concedes that the amendment requires that the "habitually used" provision be applied to all railroads subject to the tax, but it asserts that the amendment was not intended to change the law pertaining to taxation of rolling

stock. Since the 1972 amendment became effective, the Commission says, the same methodology used since 1928 has been followed consistently without interruption and without objection by any railroad until the Railway initiated this proceeding. The Commission argues that it has property determined the Railway's rolling stock "habitually used" in Virginia by using the apportionment formula based on car miles.

The Commission frames the first question on appeal to be whether Virginia can tax all the rolling stock of a railroad which is domiciled and operated solely in Virginia even though some of the railroad's rolling stock never enters the State, or does so only sporadically. This question must be

answered in the affirmative, the Commission says, except for rolling stock for which the railroad has established another tax situs. The Railway, while conceding that Virginia properly imposed such a tax for many years, views the crucial issue to be whether Code Sec. 58-524, as amended in 1972, authorizes Virginia to tax all the Railway's rolling stock, wherever used. We agree that resolution of this appeal turns not upon what Virginia has the right to tax but upon what it has elected to tax under the statute. To determine the legislative intent we will review briefly the history of the taxation of rolling stock in Virginia.

An early statute required every "railroad and canal company not exempted from taxation by virtue of its

charter" to report annually its real and personal property, including rolling stock. Acts 1881-82, c. 119. In Marye v. Baltimore and Ohio Railway, 127 U.S. 117, 8 S.Ct. 1037, 32 L.Ed. 94 (1888), the United States Supreme Court reviewed this statute. The Baltimore and Ohio Railway (B. & O.) was incorporated in Maryland; under its charter its rolling stock was exempt from taxation. The B. & O. had no track in Virginia, but it connected with certain railroads incorporated in Virginia and operated these roads under leases or contracts, using its own rolling stock for the purpose. No rolling stock was permanently set apart for use on these lines. Virginia assessed a tax on the rolling stock of the B. & O. used on these Virginia

railroads and attempted to collect by distraint. A Federal court in Virginia enjoined the collection, and an appeal to the Supreme Court followed. Virginia argues that the tax was assessed only on rolling stock in "constant use" in Virginia. The B. & O. argues that without legislation to the contrary, the tax situs of its personal property was in Maryland, the B. & O.'s place of domicile.

In upholding the injunction, the Supreme Court ruled that the statute applied only to domestic corporations in Virginia. In dicta, however, the Court's opinion stated that if Virginia permitted the B. & O. to bring rolling stock into Virginia "habitually to use" it therein, Virginia could by statute tax such rolling stock even if the

individual items were constantly changing. In such cases, the opinion volunteered, "the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used ...." Id. at 123-34, 8 S.Ct. at 1040.

It appears this suggestion prompted the General Assembly to enact a statute requiring "[e]very railroad and canal company of this state not exempted from taxation by virtue of its charter" and every such company incorporated under the laws of another State and doing business in Virginia to report and pay taxes on its real and personal property. Acts 1891-92, c. 254, p. 429. Included under paragraph "Fourth" to be reported was rolling stock, "provided, that the rolling stock of

foreign corporations doing business in this state shall be assessed on the average amount of such property habitually used in this state." Id.

Until 1972, this proviso, without substantial change in language, remained in the statute providing for assessment of rolling stock. See Acts 1906, c. 300; Acts 1910, c. 281; Acts 1912, c. 214; Acts 1915, c. 141; Code of 1919 Tax Bill Sec. 27; Acts 1926, c. 358; Acts 1927, c. 111; Acts 1928, c. 45, p. 142; Tax Code Sec. 215 (1936); and Code of 1950 Sec. 58-524(5).

From 1915 to 1936, another statute required the Commission to assess annually the rolling stock of all corporations operating railroads and doing business in Virginia "so far as the same is taxable in this State."

Acts 1915, c. 80, p. 112; Code of 1919 Sec. 2207; Acts 1926, c. 576, pp. 956-57. The statute was repealed by Tax Code Sec. 436 (1936); subsequently, the Commission's duties in the assessment of rolling stock were included in Sec. 215 of the 1936 Tax Code, then in Secs. 58-524, et seq. of the 1950 Code. The language "so far as the same is taxable in this State" was eliminated.

The 1972 amendment to Sec. 58-524 (Acts 1972, c. 813) requires "[e]very railway company doing business in this State" to report its real and tangible personal property. References to canal corporations, to corporations of Virginia not exempt from taxation by their charters, and to foreign corporations doing business in Virginia

were deleted. The amendment to the proviso in Sec. 58-524(5) applying to rolling stock deleted the words "foreign railway and canal corporations doing business in this State" and replaced them with the word "they," which apparently refers to every railway company doing business in Virginia. The proviso now reads "provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State."

It is clear, as the Commission concedes, that the amended proviso applies to railroads operating exclusively within Virginia as well as to those operating both within and without the State. Thus, all railroads operating in whole or in part in

Virginia are assessable for taxation on rolling stock "habitually used" in Virginia.

The Commission says that there has been no change in its methodology for assessing rolling stock since 1928 and that the 1972 amendment did not make any substantive change in the law. Under Sec. 163 of the 1902 Constitution, the Commission notes, foreign corporations were prohibited from performing public service business in Virginia except for those foreign corporations engaged in such business on the effective date of the Constitution. Under Article IX, Sec. 5 of the 1971 Constitution, the prohibition was restated without a "grandfather" exception. Therefore, the Commission says, deletion by the

1972 amendment to Code Sec. 58-524(5) of the references to foreign corporations doing railroad or canal business in Virginia merely eliminated obsolete surplusage because there were at that time no such corporations.

Before the 1972 amendment, Code Sec. 58-524 and predecessor statutes provided for taxation of all the rolling stock of Virginia railroads, while providing for taxation of only the rolling stock "habitually used" in Virginia by foreign railroad companies. There was no express statutory authority, therefore, to assess only the rolling stock "habitually used" in Virginia by Virginia railroad companies engaged in multistate operations. Nevertheless, as the Commission says, there have

always been constitutional restrictions on the taxation of multistate operations. The 1928 administrative order recognized these limitations by providing an apportionment process for determining the Virginia assessment of rolling stock of all railroad companies, domestic as well as foreign, which operate both in Virginia and elsewhere. Whether necessary or not, since 1928 the Commission has also used the same methodology for determining the assessment of the rolling stock of intrastate railroads. Thus, since 1928 the Commission has been assessing all railroad rolling stock "habitually used" in Virginia as determined by the percentage of car miles (or in certain instances track miles) in Virginia to total car miles throughout the

railroad's system. In the present case, this results in assessment of all the Railway's rolling stock.

Tax statutes are to be construed strictly against the taxing authority. Com. Nat. Resources v. Commonwealth, 219 Va. 529, 537, 248 S.E.2d. 791, 796 (1978). The construction of a tax statute by the taxing authority, however, is entitled to great weight. Webster v. Department of Taxation, 219 Va. 81, 84-85, 245 S.E.2d 252, 255 (1978). This is especially true where, as in the present case, there has been widespread acquiescence in the construction.

There is a basic presumption, the Commission argues, that an intrastate railroad has only enough cars to render its public service in Virginia and that

it is habitually using all its own cars for that purpose. We agree that this is a reasonable presumption. We also agree that the Commission may reasonably presume that to the extent an intrastate railroad does not use its own cars in Virginia, it uses cars of other railroads which are in effect substitutes for its own. The presumptions, however, are rebuttable. Perhaps, as the Commission maintains, there was no legislative intent to change the substantive law by the 1972 amendment to the statute. Nevertheless, in its present form, the statute, regardless of intent, unequivocally mandates assessment on the average amount of rolling stock habitually used in Virginia, and the statute is controlling. However, it is habitually

using all its own cars for that purpose. We agreed that this is a reasonable presumption. We also agree that the Commission may reasonably presume that to the extent an intrastate railroad does not use its own cars in Virginia, it uses cars of other railroads which are in effect substitutes for its own. These presumptions, however, are rebuttable. Perhaps, as the Commission maintains, there was no legislative intent to change the substantive law by the 1972 amendment to the statute. Nevertheless, in its present form, the statute, regardless of intent, unequivocally mandates assessment on the average amount of rolling stock habitually used in Virginia, and the statute is controlling. However

reasonable may be the Commission's presumptions, they may be rebutted when the assessment is challenged.

As the Commission concedes, an intrastate railroad may rebut the presumption that all its cars are habitually used in Virginia by showing that some have established a tax base elsewhere. This rebuttable evidence is not available in the present case because none of the Railway's cars is subject to taxation outside Virginia. We conclude that an intrastate railroad may also rebut the presumption by showing that the average amount of rolling stock habitually used by it in Virginia, including cars of other railroads, is less than the total amount of its rolling stock.

We reject the Railway's contention that only its rolling stock used in Virginia for at least six months during the tax year was "habitually used" within the meaning of the statute. The word "habitually" has been defined as "customarily." Black's Law Dictionary, 640 (rev. 5th ed. 1979). Freight cars might be customarily used in Virginia for only a brief period of time within the tax year, far less than six or even two months. The Commission is uniquely qualified to make this determination in evaluating the relevant evidence.

We hold that the Railway may rebut the presumption that all its rolling stock is habitually used in Virginia by showin that the average amount habitually used, including cars of other railroads, is less than the 323

cars comprising its entire fleet. Upon such a showing, the Railway may be assessed only on the lesser amount.

We will reverse the order of the Commission and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

STATE CORPORATION COMMISSION

January 21, 1983

PETITION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST810005

For review and correction of tax assessment pursuant to Virginia Code Section 58-672

OPINION AND FINAL ORDER

On August 10, 1981, the Winchester and Western Railroad Company (hereinafter "Company" or "Winchester and Western"), pursuant to Code Sec. 58-672, applied for review and correction of taxes on the Company's rolling stock assessed by Commission order dated May 20, 1981. Assessment was made pursuant to Title 58, Article 2 of the Code of Virginia.

By order dated December 23, 1981, a

hearing was scheduled for March 18, 1982, and notice directed to interested parties. By order dated February 25, 1982, at the request of the Winchester and Western, the hearing date was rescheduled for May 21, 1982. Present at the hearing were Flournoy L. Largent, Esquire, John F. Anderson, Esquire, and Joseph S. Shapiro, Esquire, for the Winchester and Western. Kenneth W. Thorson, Esquire, appeared for the Attorney General and Edward C. Tosh, Esquire, appeared for the Commission's Staff. No protestants or interveners participated in the proceeding.

On August 12, 1982, the Hearing Examiner filed his report with the Clerk of the Commission. After a discussion of the facts and issues of

the case, the Hearing Examiner made the following findings:

(1) Winchester and Western Railroad Company is a wholly-owned subsidiary of Unimin Corporation.

(2) The entire 18 miles of Winchester and Western Railroad Company track is located within Virginia.

(3) That Railroad was the lessee of 325 rail cars under a long-term lease prior to 1980.

(4) All 325 cars bore the Railroad's markings during 1980.

(5) 209 of the 325 cars were not used in Virginia at any time during 1980.

(6) 42 of the 325 cars were used in Virginia less than, or equal to, two months during 1980.

(7) 14 of the 325 cars were in

Virginia between two and six months during 1980.

(8) Unbeknownst to the Commission's Division of Public Service Taxation, two of the 265 cars that were used in Virginia less than six months during 1980 were destroyed before December 31, 1980.

(9) 60 of the 325 cars were used in Virginia for more than six months during 1980.

(10) None of the 325 cars were subject to taxation in any State other than Virginia for the calendar year 1980.

(11) The Railroad used cars on its track in Virginia during 1980 that did not bear its markings and which were not assessed against the Railroad.

(12) The Commission's Division of

Public Service Taxation assessed the 325 cars for the calendar year 1980 pursuant to Virginia Code Sec. 58-515, Sec. 58-524 and an Administrative Order of the Commission dated May 25, 1928.

(13) That method of assessment used by the Division of Public Service Taxation in this case has been uniformly applied in Virginia since 1928.

(14) The words "habitually used," within the context of Virginia Code Sec. 58-524, do not preclude assessment of the Railroad's rolling stock using the Division of Public Service Taxation's methodology for the calendar year 1980.

(15) The 1980 assessment was based on the number of cars owned or operated by the Railroad on December 31, 1980.

(16) The railroad owned or operated 323 cars on December 31, 1980.

(17) Assessment of 323 of the 325 cars was proper.

The Hearing Examiner recommended that the Comission adopt his findings and his conclusion that the assessment of 323 cars for the calendar year 1980 was proper.

The Winchester and Western filed exceptions to the report and requested an opportunity to argue its case orally before the Commission.

By order dated September 8, 1982, argument was scheduled for September 27, 1982, and was thereupon heard by the full Commission, Commissioner Shannon presiding. Counsel appearing were John F. Anderson, Esquire, for the Winchester and Western, Kenneth W.

Thorson, Esquire, for the Attorney General of Virginia and Edward C. Tosh, Esquire, for the Commission's staff.

Code Sec. 58-524 provides for every railroad operating in Virginia to report "...its real and tangible personal property... as of the thirty-first day of December preceding..."; included in the report is a classification for ". . . Rolling stock, which shall include all locomotives, of whatever motive power, . . ., cars of every kind and description . . . provided, they shall report and be assessed on the average amount of rolling stock habitually used by them in this State . . .."

The Winchester and Western's undisputed evidence shows that of the 325 cars assessed by the Commission for

taxation for 1980, 209 did not enter Virginia during that year; the remaining 116 did. The Winchester and Western contends that none of the 209 cars are amenable to Virginia taxation because they were never used in Virginia during 1980. While the statutory language, "habitually used, is not defined in the Code, the Company contends that "habitually used" means "used in Virginia for six months or more". Therefore, argues the Company, that the 116 cars which entered Virginia, only 60 were "habitually used" since only 60 cars were "used for six months or more". Logically, if the Company's definition is accepted, it should be assessed on only those 60 cars.

It is obvious that the "habitually

used" concept is incorporated in the statute in recognition of the federal proscription against multistate taxation of the same property used in interstate commerce without first making an appropriate proration of the tax base. In the case of Virginia, this proration is accomplished by the use of total Virginia car miles traveled, calculated as a percentage of total system car miles traveled over the reporting railway. This percentage is then applied to the depreciated value of all rolling stock owned, or under long term lease, by the reporting line, and bearing that Company's markings - regardless of the physical whereabouts of the cars throughout the taxable year.

It is a matter of common knowledge,

and this record indicates, that the supply of railroad rolling stock available to railroads operating in this country is a constantly moving, changing mix. Cars freely move from the tracks of one railroad onto the next, and from one state to another. Cars of "foreign" railroads are constantly being used in Virginia in both interstate and intrastate movements over lines operating in and out of the State. Similarly, portions of the rolling stock of all Virginia railroads are in constant use outside Virginia in train movements of both foreign and domestic companies. In the case of the Winchester and Western, any use of its cars outside Virginia could only be over the line of another company which, of course, could be a

company not operating in Virginia (a foreign corporation), or a domestic company having out of state lines as part of its system operations. Of course, it can be expected that Winchester and Western cars will be operated continuously within Virginia over the lines of other companies.

The question to be resolved is whether Virginia can tax all railroad rolling stock of a railroad which operates solely in Virginia even though some portion of that rolling stock never enters Virginia, or does so only sporadically.

The taxation of railroad rolling stock in Virginia dates back to before the turn of the century and was specifically provided for by the 1903 Constitution of Virginia Sec. 176. It

appears that until the enactment of Chapter 358, 1926 Acts of Assembly, the language of the taxing mandate was essentially that the State Corporation Commission assess annually, "[T]he value of rolling stock of all corporations operating railroads by steam and doing business in the State, so far as the same is taxable in the State, ..." (See Sec. 2207 Code of Virginia, 1919). The last clause of the foregoing, again, was in recognition of the federal constitutional limitation affecting interstate commerce.

With the enactment of the aforesaid Chapter 358 of the 1926 Acts of Assembly, the pertinent language of Sec. 58-524, Code of 1950, evolved, namely:

Fifth. - Rolling stock, which shall include all locomotives...; provided, that foreign railway and canal corporations doing business in this State shall report and be assessed on the average amount of rolling stock habitually used by them in this State. (1926 Acts of Assembly, Chapter 358).

It is noted that the "proviso clause", above, was limited to foreign corporations doing business in Virginia. Again, the law recognized the constitutional limits upon the taxing of companies engaged in multi-state operations. No such limitation was imposed upon an operation limited to an intrastate

system.

A comparison of the foregoing 1926 enactment with the language of present Code Sec. 58-524, prior to amendment in 1972, will show the two to be identical. In 1972, the subject "canal boats" (previously considered to be rolling stock) was deleted, and in the proviso clause the word "they" was substituted for "foreign railway and canal corporations doing business in this State". The Commission was fully informed at the time Sec. 58-524 was amended, along with many other related tax sections, and participated in that effort, the purpose of which was to delete outdated language.

Given the nature of the use of railroad rolling stock in the United States, it was obviously necessary at

an early date for the Commission, as the agency charged with the assessment of the State tax on railroad rolling stock, to develop an appropriate methodology to perform that function in a legal manner. At least as early as 1928 we find the adoption of an "Administrative Order" providing such methodology. Paraphrased, as here pertinent, that order required each railroad operating lines in Virginia (whether or not the company's lines extended into other states) to report car miles operated within Virginia and, when appropriate, car miles operated over the lines of the taxpayer lying outside Virginia. In each case, the total depreciated value of all cars owned or leased by each reporting carrier (as opposed to foreign

carriers' cars operating over such lines) was then assessed by applying to the total depreciated value the percentage of total car miles operated in Virginia. Car miles are nothing more than the total miles traveled by all cars over the tracks of the reporting company - regardless of who owns the cars and regardless of whether loaded or empty. Car miles during any period may actually have been logged by cars foreign to the reporting company.

A railroad operating exclusively within Virginia, as is the case here, could only report intrastate car miles. Therefore, in assessing its rolling stock, the percentage to be applied to the value of its car fleet is 100 percent. This basic procedure has been unchanged at least since 1928.

In the case of some small companies which lack an accurate recording of car miles, the apportionment is determined by the ratio of Virginia track miles to total system track miles. In the case of an exclusively intrastate line it could make no difference how the ratio is determined - it remains 100 percent.

We are cognizant of the principle which recognizes the possibility that particular cars can acquire a "tax situs" outside the state of domocile which otherwise would tax them as domicilary property. However, that issue is not before the Commission and the evidence establishes that no other jurisdiction is taking, or threatening to tax, the property here in issue.

While the Winchester and Western

appears to acquiesce in the correctness of the above-described methodology as it was applied from 1928 until 1972, it argues that the 1972 amendment to Code Sec. 58-524 (hereinabove described) voids that methodology in the case of all intrastate lines - including, of course, the Winchester and Western. The Company contends that before 1972 the term "habitually used" applied only to foreign companies operating lines in Virginia. Therefore, according to the Winchester and Western, purely intrastate rail systems were properly taxed on <u>all</u> rolling stock. However, it is contended, since the term "habitually used" is no longer restricted to foreign corporations doing business in this State, its limitations must apply equally to <u>all</u>

operators, including the intrastate operation of Winchester and Western.

We agree that no distinction is now made in Code Sec. 58-524 between "...foreign railway corporations doing business in this State..." and any other companies conducting such business. Therefore, the "habitually used" provision must be applied equally to all railroads subject to the tax.

In fact, we find that the Winchester and Western has been treated precisely as all other railway companies operating in Virginia, both interstate and intrastate lines. Cars "habitually used" by all such companies are calculated by the use of reported car miles (or track miles in limited instances.) A company with no track outside Virginia can report no

out-of-state car miles.

The amendment to Code Sec. 58-524 was adopted over ten years ago. A number of railway companies were strictly intrastate operations prior to 1972 and six of those remain in operation today. All of these companies have rolling stock subject to the tax in questions, and all are assessed 100 percent by Virginia just as they were prior to 1972. Included in the list of such companies in The Richmond, Fredericksburg and Potomac Railroad Company, a portion of those cars are constantly scattered across the nation's railroads, subject to the "per diem" rules of the Association of American Railroads.

The amendment in 1972 to Code Sec. 58-524 was not intended to change the

law on rolling stock taxation. In practice, as has been outlined above, no distinction has been made, at least since 1928, between foreign and domestic railroad companies operating within Virginia in the reporting and assessing of railroad freight train cars. The "habitually used" language, or words of similar intent, have, for over fifty years, been effectuated by the use of the car mileage yardstick being applied in like manner to all railroads. The 1972 amendment codified that long-standing practice, as is clearly evidenced by the unbroken and continuing assessment procedures since the amendment, and the acceptance thereof without challenge by all other companies affected.

It is clear to the Commission that

the Winchester and Western never intended to operate the cars in question as rolling stock in the discharge of its common carrier obligations. In fact, the arrangement appears to be a device to enable Unimin Corporation (the parent of Winchester and Western) to control the cars in question for its corporate purposes - generally outside Virginia - as opposed to the usual purpose of car acquisition by a railroad company, i.e., to be used in every day interchange service. Nevertheless, the cars, in fact, are leased to a Virginia railroad company and bear the markings of that operating railroad. By so doing, those cars are taxable by Virginia, regardless of the underlying business motives of the parties.

The interpretation of "habitually used" urged by petitioner is totally without statutory or historical support. To try to apportion car values in relation to "time used" would, in itself, create a reporting nightmare for legitimate operating railroads. No doubt, any such scheme could be expected to reduce, significantly, the rolling stock tax assessment because of the historial, unrestricted use of "foreign" cars in Virginia by carriers having only intrastate mileage as well as those with interstate system mileage.

We have been given no sound reason for abandoning, or modifying, our present assessment of the State's rolling stock tax, which we find totally consistent with the present and

past provisions of Code Sec. 58-524.

The Winchester and Western's testimony indicates that, unknown to the Staff, two of the 325 cars assessed were destroyed prior to December 31, 1980 (the statutory date of determination). Therefore, the assessment will be corrected so as to eliminate the value of the two destroyed cars.

Accordingly, in light of the record in this case, the report of the Hearing Examiner, and the applicable law;

IT IS ORDERED:

(1) That the Staff's assessment of the value of Winchester and Western rolling stock as of December 31, 1981, be changed to reduce it from $9,876,122 to $9,818,128, thus removing the assessed value of the two cars

destroyed prior to December 31, 1980;

(2) That the attested copies of this order be mailed to Flournoy L. Largent, Esquire, and John F. Anderson, Esquire, P.O. Box 444, Winchester, Virginia 22601; to Kenneth W. Thorson, Esquire, Office of the Attorney General of Virginia, 101 North 8th Street, 5th Floor, Richmond, Virginia, 23219; and to the Commission's Division of Public Service Taxation.

(3) That nothing remaining herein to be done, this case is hereby dismissed and the papers shall be passed to the file for ended causes.

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 18, 1983

PETITION OF

WINCHESTER AND WESTERN RAILROAD COMPANY — CASE NO. PST810005

For review and correction of tax assessment pursuant to Virginia Code Section 58-672

BRADSHAW, Commissioner, dissenting

It is my opinion that the tax in issue only applies to railroad cars "habitually used" in the Commonwealth of Virginia. Therefore, the paramount issue for decision is the meaning of the statutory words "habitually used in this State."

First, examine finding No. (5) made by the Hearing Examiner: (5) 209 of the 325 cars were not used in Virginia at any time during 1980. Logic dictates that under no circumstances

could non-use be defined as habitual use. The situs of these cars could possibly be the taxing duty of another state, but clearly not Virginia. Therefore, I find no tax liability accruing for the 209 cars not used in Virginia at any time during 1980.

Second, examine finding No. (6) made by the Hearing Examiner: (6) 42 of the 325 cars were used in Virginia less than, or equal to, two months during 1980. The task of attempting to define "habitual use" becomes more difficult when the use in Virginia is shared with another jurisdiction.

Counsel for the Petitioner has provided in his brief an exhaustive search for guidance in attempting to define the words "habitually used." I shall reserve or leave to higher

authority the task of an all-embracing definition of habitual use. It would appear on first blush that during 1980 when 42 cars were used in Virginia two months and ten months in another jurisdiction, that the habitual use of these cars was beyond the boundaries of the Commonwealth of Virginia. However, this would be equating 'substantial use' with 'habitual use.'

I am of the opinion habitual use does not necessarily mean allocation of time between two or more jurisdictions. For example, suppose 42 cars are used by the Winchester and Western Railroad Company in Kansas ten months of the year, and used annually two months in Winchester, Virginia, to transport the apple harvest to market - one could argue these 42 cars are

habitually used during the apple season in Virginia and therefore subject to Virginia taxation. However, the evidence of use in this record for the 42 cars is confined to a single year, 1980. No habit has been established. Since Virginia has stayed by the rule that tax laws are construed against the Government and will not be extended by implication, no tax should attach to the 42 cars referred to in finding number six.

I concur with my majority colleagues in not assessing any tax of the two cars (finding [8]) destroyed prior to the statutory date of determination, December 31, 1980. If the majority view is that no tax attached by virtue of destruction - meaning they are no longer in Virginia

- would not the same reasoning apply to the 209 cars never in Virginia?

I respectfully disagree with the majority in some of their findings beyond the scope of a habitual use. Examine Finding No. 12 which they support:

> (12) The Commission's Division of Public Service Taxation assessed the 325 cars for the calendar year 1980 pursuant to Virginia Code Sec. 58-524 and an Administrative Order of the Commission dated May 25, 1928.

I find no basis, need, or reason for reliance upon any administrative order, regardless of its age, when you have clear statutory direction from the Legislature. No administrative order should add, subtract, or modify any taxing statute enacted by the Legislature. It is my opinion that the

staff, for the purpose of administrative ease, has relied too long on this 1928 administrative order.

The majority supports (finding [13]) whereby the method of assessment has been uniformly applied since 1928. I too have respect for precedent and administrative practice. However, administrative practice in violation of clear statutory language is not sound precedent to follow. Administrative practice 'habitually mis-used' for fifty-two years does not make it right.

The majority states on page nine: "to try to apportion car values in relation to 'timed used' would, in itself, create a reporting nightmare." This was probably true in 1928 - an age of pads and pencils. It was also probably the reason the staff by

administrative order developed an easier yardstick for assessment purposes. Taking judicial notice of the fact that today over 200 private railroad car companies operating in Virginia submit annual computer printouts of 'actual use,' I respectfully disagree with their finding as to the possible reporting difficulty. I would like to think that our lawmakers consider reporting difficulties when enacting any and all tax laws.

Lastly let me pose two suppositions which I feel support the logic of this dissent. Reference is made to Sec. 58-556.

> "The President or other chief officer of every car company, car trust, mercantile company or corporation or individual not domiciled within this State owning any

> stock cars, furniture cars, fruit cars, refrigerator cars, meat cars, oil cars, tank cars or other similar cars, other than a railroad operating a line of railroad, shall annually, on or before the fifteenth date of April in each year. report to the Commission a true, full and accurate statement, verified by the affidavit of the officer or person making the same, showing the aggregate number of miles made by their several cars over the several lines of railroad in this State during the year ending the thirty-first day of December next preceding and a further statement showing the average number of miles traveled per day by the cars of the particular class or classes covered by the statement, in the ordinary course of business during the year."

Suppose the Petitioner organized a leasing company in the state with the lowest tax rate and let the cars bear the markings of the leasing company. The leasing company would then be taxed per 'actual use' as a private car company under Sec. 58-556. The tax

rate is the same for private car companies as legitimate railroads - $1.00 per hundred. However, the assessment for private car companies is computed by the Commission staff on an average (statutory direction Sec. 58-558) unlike legitimate railroad assessments computed on actual cost per car (administrative practice) resulting always in favor of lower assessments for private car companies. A railroad car is a railroad car. Title to a railroad car should not cause any difference in the taxing methodology for assessment purposes. Here again the staff has relied on unchallenged practice which I find no logic for - certainly no equity.

Now suppose a leasing company is formed in Virginia. Would <u>any</u> tax be

due the State Corporation Commission? In line two of Sec. 58-566 only companies "not domiciled within the State" are required to file an annual report. Is this a loophole whereby the tax to the Commission could be avoided for private car companies domiciled in Virginia? I suggest it is.

Accordingly I find:

(1) The 1980 assessment for Winchester and Western Railroad Company should be corrected.

(2) Copies of this opinion should be mailed to Flournoy L. Largent, Esquire, and John F. Anderson, Esquire, P.O. Box 444, Winchester, Virginia 22601; to Kenneth W. Thorson, Esquire, Office of the Attorney General of Virginia, 101 North 8th Street, 5th

Floor, Richmond, Virginia 23219; and to the Commission's Division of Public Service Taxation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND

PETITION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST810005

For review and correction of tax assessment pursuant to Virginia Code Section 58-672

REPORT OF CHARLES W. HUNDLEY, HEARING EXAMINER

August 12, 1982

HISTORY OF THE CASE

Pursuant to orders of the Commission entered December 23, 1981 and February 25, 1982, this matter came to be heard by the undersigned Examiner on May 21, 1982 upon a petition for review and correction of taxes pursuant to Virginia Code Section 58-672 filed August 10, 1981. Testimony, exhibits and a transcript

have been previously filed with the Commission. The Petitioner filed a memorandum of law on June 8, 1982.[1]

Counsel appearing were Flournoy L. Largent, Esquire, John F. Anderson, Esquire and Joseph C. Shapiro, Esquire, for the Applicant Winchester and Western Railroad Company; Kenneth W. Thorson, Esquire, for the Attorney General; and Edward C. Tosh, Esquire, for the Commission's Staff. There were not Protestants or Intervenors in this proceeding.

Proof of notice was received as Exhibit A.

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[1] Doc. Cont. No. 82061 0174.

This case concerns a petition for review and correction of a 1980 assessment made by the Commission's Division of Public Service Taxation (PST) against rolling stock leased to a Virginia railroad.[2] The Railroad specifically limits the basis of its petition to construction of a term

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[2] 1980 rolling stock taxes, based on the assessment of 325 cars, equal $98,761.22. The Railroad believes the amount, based on 60 cars, should be $19,861.29.

found in a Virginia statute after it was amended in 1972.[3]

The construction concerns whether the leased rolling stock was "habitually used" in Virginia during the calendar year 1980. The Division of Public Service Taxation assessed the rolling stock using a methodology established by a 1928 Commission

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[3] Va. Code Section 58-524. Constitutional questions, such as whether the assessment violates the due process or commerce clauses, were briefly mentioned in Paragraph 8 of the Railroad's petition filed August 10, 1981. Such questions were not raised or otherwise discussed in subsequent filings, testimony or argument and are deemed abandoned. See Union Refrigerator Transit Company v. Kentucky, 199 U.S. 194 (1905); and Norfolk and Western Railway Company v. Missouri State Tax Commission, 390 U.S. 317 (1968).

order. The Railroad claims that the 1928 order does not apply to it after the statute was amended in 1972. The Railroad also claims that the common meaning of the words "habitually used" should control the disposition of this case.

The Railroad is a subsidiary of Unimin Corporation. It hauls sand from Unimin's mine in Gore, Frederick County, Virginia, the origin of the line, for 18 miles to Winchester, Virginia, the terminus of its track. At Winchester the cars are transferred to the B&O Railroad for delivery in Virginia and adjacent states. The entire trackage of Winchester and Western Railroad is 18 miles.

The Railroad offered the testimony of Mr. David Luke Williams, General Manager of Distribution for Unimin Corporation, and Vice President of Traffic for the Winchester and Western Railroad. The Staff offered the testimony of Mr. Lee O'Bryan, Deputy Director of the Commission's Public Service Taxation Division whose responsibilities include assessment of railroad rolling stock.

GENERAL POSITIONS OF THE PETITIONER AND STAFF

It is the position of the Railroad that the determination whether its cars are "habitually used" in Virginia should be made by comparing use within

and without Virginia.[4] According to the Railroad, physical location of the cars during 1980 is a primary factor used to determine "habitual use." The Railroad believes that only the 60 cars which were used in Virginia for more than six months during 1980 were "habitually used" in Virginia.

According to the Staff, physical location of rail cars owned or operated by a railroad with all its track in Virginia is not a determining factor when assessing rolling stock. Because 100 percent of the Railroad's track is located in Virginia, all of

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[4] See Petitioner's Memorandum of Law filed with the Commission on June 8, 1982 (Doc. Cont. No. 82061 0174) p.14.

its car-miles are also in Virginia.[5] Therefore, according to the Staff, all of the cars the Railroad owned or operated on December 31, 1980 should be taxed in Virginia.

No orders or opinions have been found in Commission records that interpret the "habitually used" language of the statute since the 1928 order was entered.

Most of the facts are not in dispute. There is no controversy that all of the Railroad's track is located within Virginia. There is also no controversy that a significant number of the 325 leased cars bearing the

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[5] One railroad car traveling one mile on that railroad is one car-mile.

Railroad's markings have never been physically located in Virginia. There is no controversy that the Commission's 1928 Administrative Order was properly applicable to Winchester and Western prior to 1972.[6]

ISSUE

The only issue in this case is whether the words "habitually used", within the context of Virginia Code Section 58-524 after the 1972 amendments, preclude assessment of the Railroad's rolling stock using the Staff's 1928 methodology for the calendar year 1980.

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[6] See Petitioner's Memorandum of Law, op. cit., p.10.

APPLICABLE STATUTES AND COMMISSION ORDER

Virginia Code Section 58-515. State tax on rolling stock. - The state tax on the rolling stock of railway companies doing business in this State shall be at the rate of $1 on each $100 of the assessed full value thereof and there shall be no local taxes on such rolling stock (1926, p. 955, 1927, p. 213; 1928, p. 145; 1934, p. 196; Tax Code, Section 216; 1948, p. 918; 1972, c. 813).

Virginia Code Section 58-524. Annual property report required. - Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located. The lien of the State or subdivision thereof for taxes levied on such property for all purposes shall attach to such property on the thirty-first day of December next preceding.

The report shall classify such property under the following heads:

. . .

(5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State. (Emphasis supplied);

. . .

(1926, p. 650; 1927, p. 213; 1928, p. 141; Tax Code, Section 215; 1956, c. 69; 1960, c. 346; 1964, c. 425; 1972, c. 813).[7]

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[7] And see 1928 Acts of Assembly 147; Tax Code, Section 217 (situs of rolling stock). The "habitually used" language found in Va. Code Section 58-524 predates the 1928 order.

According to the Railroad, the words "habitually used" connote a "constant, customary, accustomed, usually, common, ordinary, regular or familiar" use of the 325 railroad cars in Virginia.[8] Therefore, according to the Railroad, cars which are not constantly, customarily, etc., used in Virginia should not be considered "habitually used" and should not be assessed under Section 58-524. The Staff relies on the 1928 order:

> IN RE: ASSESSMENT OF ROLLING STOCK OF STEAM RAILROAD COMPANIES - ADMINISTRATIVE ORDER
>
> IT IS HEREBY ORDERED that for the year 1928 and thereafter, to the further

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[8] See Petitioner's Memorandum of Law, op. cit., pp. 3-7.

order of this Commission,[9], the rolling stock of steam railroads assessible in Virginia shall be determined as follows:

. . .

3 - FREIGHT TRAIN CARS:

(a) All freight train cars (except caboose cars) shall be apportioned, apporting to the State of Virginia that proportion which the car miles made by such equipment in Virginia is of the car miles made by such equipment on the entire system.

DISCUSSION

(1) The Railroad argues that the 1972 amendments to Section 58-524 preclude application of the methodology established by the 1928

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[9] There has been no "further order of this Commission" affecting the 1928 order.

order to Winchester and Western for the calendar year 1980. I respectfully disagree.

According to the Railroad, the "habitually used" language of the statute applied only to foreign railroad corporations when the 1928 order was entered. Also according to the Railroad, the failure of the 1928 order to specifically refer to the "habitually used" language makes the order inconsistent with the statute after the 1972 amendments. Apparently the Railroad believes that the 1928 order was applicable only to railroads incorporated in Virginia from 1928 until 1972 and, after 1972, the order should not apply to Virginia railroads.

Before the 1972 amendments, Section 58-524 required that:

> Every railway . . . corporation of this State, not exempt from taxation by virtue of its charter, and every railway . . . corporation incorporated under the laws of any other state doing business in this State shall report . . . all of its real and personal property . . ..
>
> . . .

After the 1972 amendments, Section 58-524 required that:

> Every railway company doing business in this State shall report . . . its real and tangible personal property of every description . . .
>
> . . .
>
> (5) Rolling stock . . .; provided that they shall report . . . rolling stock habitually used . . .

The 1928 order established a methodology for rolling stock assessment. The order has been uniformly applied since 1928.

The 1972 amendments to Section 58-524 clarified the scope of the section to include "every" railroad doing business in Virginia. The "habitually used" language in the pre-1972 version of the section was limited to "foreign" railroads. However, both foreign and domestic railroads were assessed prior to 1972 using the methodology established in the 1928 order. The "habitually used" language was interpreted from 1928 to 1972 using the 1928 order even though the order did not contain specific reference to the words "habitually used". After the 1972 amendments, the "habitually used" language clearly included all railroads doing business in Virginia, and was continued to be interpreted using the 1928 order.

In my opinion, the 1972 amendments to Section 58-524 served to make clear the legislature's intent that any assessment methodology under that section be uniformly applicable to all railroads doing business in Virginia. The Division of Public Service Taxation's uniform application of an assessment methodology under the 1928 order already satisfied the legislature's intent. Therefore, the Division of Public Service Taxation's methodology for assessing rolling stock did not have to be, and was not, changed for the Petitioner as a result of the 1972 amendments.

(2) (a) The testimony of the Railroad's witness shows that, of the 325 leased cars bearing Winchester and Western markings during the calendar

year 1980, 209 were not used in Virginia, 42 were not used for periods less than or equal to 2 months, 14 were used less than 6 months, and 60 were used more than 6 months. The Railroad believes that only the 60 cars that were used more than 6 months were "habitually used" in Virginia. All of the remaining 265 cars were either associated with Unimin plants in other states or were "free running" as part of a general car pool. It appears that two of the remaining 265 cars were destroyed before

December 31, 1980.[10] It also appears that none of the 325 cars were taxed in any jurisdiction other than Virginia for the calendar year 1980.

(b) The testimony of the Staff's witness shows that all 325 cars were assessed without regard for physical locations. The Staff routinely applied the 1928 order in a manner similar to which it has been applied to all other railroads that have 100 percent of their track located in Virginia; viz., all cars owned or

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[10] The Division of Public Service Taxation was not aware that two of the cars were destroyed at the time of assessment. The Division relied on rolling stock listed with the National Railroad Registry. See Va. Code Section 58-531 (Assessment when corporation fails to make reports).

operated by the Railroad are taxed based on a 100 percent assessment.[11]

(c) The testimony of the Railroad's witness shows that there is an economic advantage for having rail

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[11] Exhibits 13 and 14; Tr., pp. 75-82.

$$\frac{\text{Car-miles in Virginia}}{\text{Car-miles in Systems}} = \text{100 percent Virginia assessment.}$$

One railroad car traveling one mile on that railroad is one car-mile.

If a small railroad is involved and it would be too great a burden on the railroad to provide car-mile data, the Public Service Taxation Division allows use of road-mile in lieu of car-mile data. One mile of track owned by the railroad equals one road-mile. Railroads with all track in Virginia would still be assessed at 100 percent.

$$\frac{\text{Road-miles in Virginia}}{\text{Road-miles in System}} = \text{100 percent Virginia assessment.}$$

cars leased to Unimin's subsidiary railroad used at Unimin plants located outside of Virginia. Other railroads serving those plants offer a more favorable traffic rate for cars with railroad markings.[12] If Unimin plants (rather than the Winchester and Western) leased the cars, rail transportation expenses would be higher.

(d) The testimony of the Railroad's witness also shows that there were "very many" cars bearing the markings of other railroads located on the Railroad's tracks

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12 Tr., p. 49 (cars with railroad markings have a more favorable per diem charge instead of a mileage charge).

during 1980.[13] None of those cars were assessed against the Railroad.[14].

(3)(a) Here we have a method of rolling stock assessment that has been uniformly employed in Virginia for more than 50 years. A Virginia railroad has chosen to lease cars and use a substantial number of them outside of Virginia on other railroads. The cars qualified for lower rail traffic rates. The cars were not taxed in other jurisdictions.

(b) The Commonwealth of Virginia did not require the Railroad to lease the cars. The Railroad's parent was

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[13] Tr., p.45.

[14] TR., pp. 80-82.

free to use some other method of ownership.[15] It is incongruous for the Railroad and its parent to expect to receive benefits directly resulting from having the cars leased to Unimin's Virginia Railroad and, on the other hand, not to expect the cars to be uniformly taxed by Virginia as part of that Railroad.

(c) As a practical matter, the existing method of rolling stock assessment is neither complex nor difficult to administer uniformly. I have doubt, were the Commission to adopt the statutory interpretion and methodology offered by the Railroad, that it would be possible to devise a

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[15] E.g., a car-line company.

reasonable assessment method that could be uniformly applied.

FINDINGS AND RECOMMENDATIONS

After considering all the evidence presented in this case, I find that:

(1) Winchester and Western Railroad Company is a wholly-owned subsidiary of Unimin Corporation.

(2) The entire 18 miles of Winchester and Western Railroad Company track is located within Virginia.

(3) The Railroad was the lessee of 325 rail cars under a long-term lease prior to 1980.

(4) All 325 cars bore the Railroad's markings during 1980.

(5) 209 of the 325 cars were not used in Virginia at any time during

1980.

(6) 42 of the 325 cars were used in Virginia less than or equal to two months during 1980.

(7) 14 of the 325 cars were used in Virginia between two and six months during 1980.

(8) Unbeknownst to the Commission's Division of Public Service Taxation, two of the 265 cars that were used in Virginia less than six months during 1980 were destroyed before December 31, 1980.

(9) 60 of the 325 cars were used in Virginia for more than six months during 1980.

(10) None of the 325 cars were subject to taxation in any state other than Virginia for the calendar year 1980.

(11) The Railroad used cars on its track in Virginia during 1980 that did not bear its markings and which were not assessed against the Railroad.

(12) The Commission's Division of Public Service Taxation assessed the 325 cars for the calendar year 1980 pursuant to Virginia Code Section 58-515, Section 58-524 and and Administrative Order of the Commission dated May 25, 1928.

(13) The method of assessment used by the Division of Public Service Taxation in this case has been uniformly applied in Virginia since 1928.

(14) The words "habitually used," within the context of Virginia Code Section 58-524, do not preclude

assessment of the Railroad's rolling stock using the Division of Public Service Taxation's methodology for the calendar year 1980.

(15) The 1980 assessment was based on the number of cars owned or operated by the Railroad on December 31, 1980.

(16) The Railroad owned or operated 323 cars on December 31, 1980.

(17) Assessment of 323 of the 325 cars was proper.

WHEREFORE, IT IS RESPECTFULLY RECOMMENDED THAT the Commission should enter an order that:

(1) ADOPTS these findings.

(2) DIRECTS that 323 cars be assessed for the calendar year 1980.

RESPONSES

Any responses to this report must be filed with the Clerk of the Commission in writing in an original and 15 copies within 15 days after the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23216.

I certify that copies of this report were mailed or delivered on August 12, 1982 to:

Flournoy L. Largent, Esquire
John F. Anderson, Esquire
P.O. Box 444
Winchester, Virginia 22601

Kenneth W. Thorson, Esquire
Deputy Attorney General
101 North 8th Street
5th Floor
Richmond, Virginia 23219

Edward C. Tosh, Esquire
Assistant General Counsel
P.O. Box 1197
Richmond, Virginia 23219

Respectfully submitted,

Charles W. Hundley
Hearing Examiner

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
APRIL 5, 1982

PETITION OF: CASE NO: PST810005

WINCHESTER AND WESTERN
RAILROAD COMPANY

For review and correction
of tax assessed pursuant
to Code Section 58-672

PETITIONER'S MORE DEFINITE
STATEMENT FOR RELIEF

Winchester and Western Railroad is a subsidiary of Unimin Corporation. It hauls sand from Unimin's mine in Gore, Frederick County, Virginia, the origin of the line, for eighteen miles to Winchester, Virginia, the terminus of its track. At Winchester the cars are transferred to the B & O Railroad for delivery in Virginia and adjacent states. The entire trackage of Winchester and Western Railroad is

eighteen miles.

Winchester and Western Railroad Company filed an Application for Review and Correction of Taxes pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

(The Code refers to an application. The State Corporation Commission denominates it a petition and refers to the applicant as the petitioner. Hereinafter for conformity, the railroad will be referred to as the petitioner and the application for relief, the petition).

The Attorney General, pursuant to Rule 5:16 (d) (ii) of the Rules of Practice and Procedure of the State Corporation Commission, filed a Motion for a More Definite Statement.

In response thereto the petitioner particularizes its claim:

I

STATUTES

The Code Sections at issue are in the Virginia Tax Code, Section 58 et seq. Chapter 12 of the Tax Code provides for taxes on public service corporations. Article 2 of Chapter 12 specifies the method and amount of taxes for railway companies. (Section 58-515 through 58-539).

Section 58-515 fixed the rate at one dollar for each one hundred dollars of the value of the rolling stock.

Section 58-524 requires each railway company to file an annual report of the fair cash value of its real and tangible property.

The report requires that the company's assets be divided into nine categories:

> "Section 58-524. Annual Property report required. Every railroad company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located. The lien of the State or subdivision thereof for taxes levied on such property for all purposes shall attach to such property on the thirty-first day of December next preceding.
>
> The report shall classify such property under the following heads:
>
> * * * *
>
> (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is

reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this state." (Emphasis supplied.)

The statute is clear that the tax applies only to that rolling stock habitually used in Virginia.

THE ISSUE

In 1980 the petitioner owned three locomotives and one flat car and leased twenty-five box-cars and three hundred covered hopper cars under two eighteen-year leases. This dispute is confined to the twenty-five box-cars and three hundred covered hopper cars.

The State imposed the tax on all three hundred and twenty-five cars. This is wrong because not all of the three hundred and twenty-five cars were

habitually used in the State of Virginia. (One box-car and one covered hopper were totally destroyed prior to December 31, 1980).

Thus the issue joined between the State and the petitioner is as follows:

The State assessed the 58-515 tax on all three hundred and twenty-five cars of the petitioner regardless of their place of use. This is error.

The petitioner says that the State can only tax the forty-five cars habitually used in Virginia and the State is apparently saying they can tax all cars of the petitioner whether habitually used in Virginia or not.

The petitioner avers and will prove that of the three hundred and twenty-five cars only forty-five are "habitually used" in the State. The

other two hundred and eighty cars are not habitually used in the State.

Stated otherwise, can Virginia, under the railway companies' tax code, assess a tax against rolling stock owned by petitioner but not habitually used in Virginia? The answer is no.

The reasons for the answer are found below:

REASONS FOR THE ANSWER

The tax is imposed on the average amount of rolling stock "habitually used" in the State.

It would not be illogical to believe that the two words "habitually used" would have a clear meaning and not be subject to question.

Webster's Third International Dictionary, 1971, Page 1017, defines the adverb as follows:

"1: by habit: CUSTOMARILY, UNTHINKINGLY

2. CONSISTENTLY, PERSISTENTLY, REPEATEDLY, USUALLY."

(The punctuation and capitalization is as it appears in Webster's.

In Peltz v. Printz, 186 Pa. St. 347, 40 Atl. 486, (1898), the court, undoubtedly using an earlier addition of Webster's, said:

"The word "habitual" is defined by Webster as 'constant, customary, accustomed, usual, common, ordinary, regular, familiar'; and this is certainly the common understanding of the meaning of the word."

Webster's at page 2524 gives the third definition of "used".

"ACCUSTOMED, HABITUATED, EXPERIENCED"

(Again the capitalization is

Webster's).

Ballentine's Law Dictionary, Third Edition, (1967) Page 544, defines "habitually" as:

> "By habit, customarily. By frequent practice."

Black's Law Dictionary, Fifth Edition, (1979) Page 640, defines "habitually" as:

> "Customarily; by frequent practice or use. It does not mean entirely or exclusively."

THE CONSTRUCTION OF THE TAX STATUTE

Virginia in 1846, recognized a well established rule of law.

> "Before proceeding further, I refer to some rules of construction, as applicable to the matter before us. 1. 'The words of a statute are to be

taken in their ordinary and familiar significatioon and import, and regard is to be had to their general and popular use; for jus et homa loquendi, is governed by usage; and the meaning of words, spoken or written, ought to be allowed to be as it constantly has been taken; loquendum est ut vulgus. Dwar. Stat. 702.

2. It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament, which imposed a duty upon the public, will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule, that where the public are to be charged with a burden, the intention of the legislature to impose that burden, must be explicity and distinctly shown. Dwar. Stat. 709.

3. A penal law is not be extended by construction; and revenue laws are of that character. In like manner, in the revenue laws, when clauses inflicting pains and penalties, are ambiguously or

> obscurely worded, the interpretation is ever in favor of the subject 'for this plain reason', said Heath, Justice, in Hubbard v. Johnson, 'that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed. Dwar. Stat. 737, 743."

This is Judge Joseph L. Fry in Plummer v. Commonwealth, 44 Va. (3 Gratt) 645, (1846). The issue was whether the State income tax applied to ministers.

In 1978, the Virginia Supreme Court stated:

> "We held in Commonwealth v. Appalach. El. Power Co., 193 Va. 37, 46, 68 S. E. 2d 122, 127 (1951) that 'it is well settled and familiar law that laws imposing taxes are to be construed most strongly against the government, and in facor of the citizen, and are not to be extended by implication beyond the clear import of the language used.

> Whenever there is a just doubt, 'that doubt should absolve the taxpayer from his burden.' Com. Nat. Res. v. Commonwealth, 219 Va. 219 Va. 529, 248 S. E. 2d 791 (1978)."

For over one hundred and thirty years, and to the date of this writing, Virginia has stayed by the rule that tax laws are construed against the government and they will not be extended by implication.

CONCLUSION

Since only forty-five of the Winchester and Western Railroad cars, which are at issue, were habitually used in Virginia in 1980, the tax should be assessed only on those cars; not on the remaining two hundred and

eighty cars not habitually used in Virginia, two of which were totally destroyed prior to December 31, 1980.

Respectfully Submitted,

WINCHESTER AND WESTERN
RAILROAD COMPANY

By:_____
Counsel

JOHN F. ANDERSON
Largent, Anderson, Larrick and Groves
Graichen Building
25 East Boscawen Street
Winchester, Virginia 22601
Counsel for Winchester and Western
Railroad Company

CERTIFICATE

I hereby certify that a copy of the foregoing Petitioner's More Definite Statement for Relief, was mailed, postage, prepaid, to:

Kenneth W. Thorson, Esq.
Assistant Attorney General
Commonwealth of Virginia
101 North Eighth Street
Richmond, Virginia, 23219

Lawrence R. Ambrogi, Esq.
Commonwealth Attorney for
Frederick County
321 South Loudoun Street
Winchester, Virginia, 22601

S. Roger Koontz
Chairman of the Board of
Supervisors
Frederick County
Route #5, Apple Pie Ridge
Winchester, Virginia, 22601

Charles Zuckerman, Mayor
City of Winchester
911 Isaac Street
Winchester, Virginia, 22601

Wendell Seldon, City Manager
City of Winchester
Rouss City Hall
Winchester, Virginia, 22601

Dabney W. Watts, Esq.
Attorney for the City of
Winchester
201 East Boscawen Street
Winchester, Virginia, 22601

this 2nd day of April, 1982, pursuant to Rule 5:13 of the Rules of Practice and Procedure of the State Corporation Commission.

JOHN F. ANDERSON

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND,
FEBRUARY 25, 1982

PETITION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST810005

For review and correction of tax assessed pursuant to Code Section 58-672

INTERIM ORDER

IT APPEARING to the Commission that by order dated February 11, 1982, the Winchester and Western Railroad Company was ordered to file any desired response to a Motion for More Definite Statement previously filed by the Attorney General; and

IT FURTHER APPEARING to the Commission that the Winchester and Western Railroad Company, by counsel, has requested additional time in which

to prepare its reply and that the hearing now set for March 18, 1982 be rescheduled to a later date. Counsel to the Petitioner represents that the Attorney General does not object to the request.

THE COMMISSION, upon consideration of the matter, is of the opinion and finds that the Petitioner's request should be granted; accordingly,

IT IS ORDERED:

(1) That the Winchester and Western Railroad Company file its response to the Attorney General's Motion for More Definite Statement on or before April 7, 1982;

(2) That the hearing be, and same hereby is, rescheduled to May 21, 1982 at 10:00 a.m.; and

(3) That attested copies of this

order be sent to Joseph C. Shapiro, Esquire, 50 Locust Avenue, New Canaan, Connecticut 06840; John F. Anderson, Esquire, and Flournoy L. Largent, Jr., Esquire, Largent, Anderson Larrick and Groves, Graichen Building, 25 East Boscawen Street, Winchester, Virginia 22601; Lawrence R. Ambrogi, Esquire, Commonwealth Attorney for Frederick County, 321 South Loudoun Street, Winchester, Virginia 22601; S. Roger Koontz, Chairman of the Board of Supervisors, Frederick County, Route #5, Apple Pie Ridge, Winchester, Virginia 22601; Charles Zuckerman, Mayor, City of Winchester, 911 Isaac Street, Winchester, Virginia 22601; Wendell Seldon, City Manager, City of Winchester, Rouss City Hall, Winchester, Virginia 22601;

Dabney W. Watts, Esquire, Attorney for the City of Winchester, 201 East Boscawen Street, Winchester, Virginia 22601; Kenneth W. Thorson, Esquire, Assistant Attorney General of Virginia, 101 North 8th Street, 5th Floor, Richmond, Virginia 23219; and to this Commission's Division of Public Service Taxation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND,
FEBRUARY 11, 1982

PETITION OF

WINCHESTER AND WESTERN RAILROAD COMPANY

CASE NO. PST810005

For review and correction of tax assessed pursuant to Code Section 58-672

INTERIM ORDER

IT APPEARING to the Commission that the Attorney General of Virginia has filed a Motion for More Definite Statement; and

IT FURTHER APPEARING to the Commission that the Petitioner should be afforded an opportunity to respond to said Motion;

IT IS ORDERED:

(1) That the Winchester and Western Railroad Company shall file

any desired response to the Attorney General's Motion on or before February 24, 1982; and

(2) That copies of this order be sent to Joseph C. Shapiro, Esquire, 50 Locust Avenue, New Canaan, Connecticut 06840; to John F. Anderson, Esquire, Largent, Anderson, Larrick and Groves, Graichen Building, 25 East Boscawen Street, Winchester, Virginia 22601; Lawrence R. Ambrogi, Esquire, Commonwealth Attorney for Frederick County, 321 South Loudoun Street, Winchester, Virginia 22601; S. Roger Koontz, Chairman of the Board of Supervisors, Frederick County, Route #5, Apple Pie Ridge, Winchester, Virginia 22601; Charles Zuckerman, Mayor, City of Winchester, 911 Isaac Street, Winchester, Virginia 22601;

Wendell Seldon, City Manager, City of Winchester, Rouss City Hall, Winchester, Virginia 22601; Dabney W. Watts, Esquire, Attorney for the City of Winchester, 201 East Boscawen Street, Winchester, Virginia 22601; and to this Commission's Division of Public Service Taxation.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
AUGUST 10, 1981

IN THE MATTER OF

WINCHESTER AND WESTERN
RAILROAD COMPANY,
A Virginia Corporation

APPLICATION FOR REVIEW AND
CORRECTION OF TAXES

Comes now the applicant, Winchester and Western Railroad Company, and applies for a review and correction of taxes assessed against it on May 20, 1981, pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Section 58-672.

1. The applicant is a Virginia corporation.

2. On May 20, 1981, it received an assessment in the amount of Ninety Eight Thousand, Seven Hundred Sixty One Dollars and Twenty Two Cents

($98,761.22) as rolling stock tax and Two Hundred and Thirty Five Dollars and Fifty Cents ($235.50) as a special tax.

3. On May 27, 1981, the applicant paid Five Thousand Ninety Eight Dollars and Eighty Cents ($5,098.80) consisting of a payment of Four Thousand, Eight Hundred Sixty Three Dollars and Thirty Cents ($4,863.30) of rolling stock tax and the entire Two Hundred and Thirty Five Dollars and Fifty Cents ($235.50) special tax.

4. On July 30, 1981, applicant received a notice of delinquent state taxes due for the year 1981 in the amount of Ninety Three Thousand, Eight Hundred Ninety Seven Dollars and Ninety Two Cents ($93,897.92) and a

penalty assessment of Four Thousand Six Hundred Ninety Four Dollars and Ninety Cents ($4,694.90).

5. Petitioner takes exception to the remaining Ninety Three Thousand, Eight Hundred and Ninety Seven Dollars and Ninety Two Cents ($93,897.92) in taxes and Four Thousand Six Hundred Ninety Four Dollars and Ninety Cents ($4,694.90) in penalty on the grounds set forth below.

6. Such tax is not authorized pursuant to Code of Virginia, as amended, 1974 Replacement Volume, Sections 58-515 and 58-524 (5), or any other section thereof.

7. Such tax is not permitted in the absence of statutory authorization.

8. Such tax is impermissible

under the Due Process Clause of the Fourteentn Amendment and the Commerce Clause of the United States Constitution.

9. Since such tax is not permitted, such penalty is not owed by the applicant.

WHEREFORE, your applicant respectfully prays that the aforesaid assessment be corrected.

WINCHESTER AND WESTERN

RAILROAD COMPANY

By:_____

JOSEPH C. SHAPIRO
General Counsel
Unimin Corporation
50 Locust Avenue
New Canaan, CT 06840
Telephone: 203-966-8880
Counsel for Winchester
and Western Railroad
Company

By:_____

JOHN F. ANDERSON
Largent, Anderson,
Larrick and Groves
Graichen Building
25 East Boscawen Street
Winchester, VA 22601
Telephone: 703-662-0321
Counsel for Winchester
and Western Railroad
Company

AFFIDAVIT

THE FOREGOING IS TRUE AND CORRECT:

Attest: WINCHESTER AND WESTERN RAILROAD COMPANY

_____ By_____
Secretary President

STATE OF CONNECTICUT,)
) ss:
COUNTY OF FAIRFIELD,)

This day personally appeared before me the undersigned Notary Public, William J. Woods, Jr., and Mary Jane Lisenby, President and Secretary, respectively, of Winchester and Western Railroad Company, who, after being first duly sworn, each made oath that the statements contained in the foregoing application are true to the best of his or her

knowledge and belief.

Given under my hand 5th day of August, 1981.

My commission expires _____

_____
NOTARY PUBLIC

IN THE SUPREME COURT
OF VIRGINIA

RECORD NO. 860055

WINCHESTER AND WESTERN RAILROAD
COMPANY, Appellant,

v.

COMMONWEALTH OF VIRGINIA and
VIRGINIA STATE CORPORATION COMMISSION
DIVISION OF PUBLIC SERVICE
TAXATION, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Winchester and Western Railroad Company, the appellant above-named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Virginia, affirming the dismissal of the complaint, entered in this action on September 5, 1986.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

By: Flournoy L. Largent Jr.
Flournoy L. Largent, Jr.
Counsel for Appellant

FLOURNOY L. LARGENT, JR.
The Yost Building
38 Rouss Avenue
P. O. Box 808
Winchester, Virginia 22601
(703) 665-4378

C E R T I F I C A T E

I do hereby certify that true and correct cop
of the Reply Brief was mailed or delivered to Ma
Sue Terry, Attorney General of Virginia, Supr
Court Building, Richmond, Virginia 23219; Kenn
W. Thorson, Assistant Attorney General, Supr
Court Building, Richmond, Virginia 23219 and Lew
S. Minter, Esquire, State Corporation Commissi
P. O. Box 1197, Richmond, Virginia 23209,
accordance with the provisions of Rule 5:26(
this 24th day of November, 1986.

Flournoy L. Largent, Jr.

(2)

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-950

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WINCHESTER AND WESTERN RAILROAD COMPANY,
Appellant

v.

COMMONWEALTH OF VIRGINIA AND VIRGINIA STATE CORPORATION COMMISSION, DIVISION OF PUBLIC SERVICE TAXATION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

MOTION TO DISMISS

Lewis S. Minter, General Counsel
William F. Schutt, Counsel of Record
Wayne N. Smith
Office of General Counsel
Virginia State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23209
(804) 786-8671

Mary Sue Terry
Attorney General of Virginia
101 North Eighth Street
Richmond, Virginia 23219

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No. 86-950

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WINCHESTER AND WESTERN RAILROAD COMPANY,
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v.

COMMONWEALTH OF VIRGINIA AND VIRGINIA STATE CORPORATION COMMISSION, DIVISION OF PUBLIC SERVICE TAXATION,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

MOTION TO DISMISS

Pursuant to Rule 16.1, Appellees Commonwealth of Virginia and Virginia State Corporation Commission* (Commission)

---

*The Commission has established as an administrative unit its Division of Public Service Taxation to collect reports and to prepare recommendations on tax assessments of public service companies operating within the Commonwealth. The assessments for various types of taxes are made by order of the Commission, and the sums due are payable to the state and local treasurers.

move the Court to dismiss this appeal on the ground that the appeal is not within the Court's jurisdiction. In the alternative, the Commission moves the Court to dismiss this appeal on the ground that the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE

Appellant Winchester and Western Railroad Company (Railroad or Company), a railroad incorporated and operating in Virginia, appeals from a decision of the Virginia Supreme Court affirming the Commission's assessment of the Company for rolling stock tax. The pertinent provisions of the Code of Virginia (1950), as amended, then in effect follow:

> §58-515. State tax on rolling stock.- The State tax on the rolling stock of railway companies doing business in this State shall be at the rate of

> one dollar on each one hundred dollars of the assessed full value thereof . . ..
>
> §56-524. Annual property report required. - Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the county, city, town or magisterial district in which it is located . . ..
>
> The report shall classify such property under the following heads . . . (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State . . ..

1972 Va. Acts 1448-51.

In April, 1981, the Railroad reported the value of its property as of December 31,

1980, and the Commission entered orders of assessment for various taxes, including the rolling stock tax imposed by Code §58-515, quoted above. As permitted by Virginia law, the Railroad applied for correction of the Commission's valuation of rolling stock and assessment of tax on that property. The Commission denied the application for correction of valuation, except for a minor adjustment to reflect a loss to fire, and the Company appealed to the Virginia Supreme Court for review.

The Virginia Supreme Court affirmed the Commission's decision on valuation of the Railroad's rolling stock in virtually all respects. The case was remanded for further proceedings on one narrow point of Virginia law. The Virginia Supreme Court found reasonable the

Commission's long-standing presumption that an intrastate railroad like the Company has only enough cars to render its public service in Virginia and that it is habitually using all of its own cars for that purpose. That presumption, however, was declared by the appellate court to be rebuttable, and the case was remanded solely to afford the Company an opportunity to rebut the presumption of habitual use of all of its cars in Virginia. Winchester & Western Railroad v. Commonwealth, 226 Va. 352, 359-60, 309 S.E.2d 590, 595 (1983) (hereinafter cited as Winchester & Western I). (App. at I-20 to -23.) The Railroad did not seek rehearing by the Virginia Supreme Court or seek review on appeal by this Court.

On remand, the Commission considered the evidence and arguments offered by the Railroad to show that the rolling stock it habitually used in Virginia, including cars of other railroads, was less than the 323 cars comprising its entire fleet on December 31, 1980, the assessment date. The Commission found that the evidence did not rebut the presumption of use and upheld its original valuation. The Company again appealed and the Virginia Supreme Court affirmed the Commission's decision on remand. Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986) (mem.) (hereinafter cited as Winchester & Western II).

The Railroad now seeks review of Winchester & Western II by appeal to this Court. The Commission understands

the Railroad to invoke the Court's jurisdiction on the grounds that §58-524 of the Code of Virginia as applied in this case is repugnant to the Commerce Clause and Due Process Clause of the United States Constitution.

The Commerce Clause provides, in pertinent part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . .." U.S. Const. art. I, §8, cl. 3. The Due Process Clause governing the states provides that, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .." Id. amend. XIV, §1.

ARGUMENT

The Commission respectfully moves the Court to dismiss the Railroad's

appeal for its failure to invoke the Court's jurisdiction. The Commission believes that the opinion of the Virginia Supreme Court in Winchester & Western II raises no issue of federal law. In the alternative, any judgment rests on adequate non-federal grounds.

THE CASE ON APPEAL INVOLVES ONLY VIRGINIA LAW

In Winchester & Western I the Virginia Supreme Court saw the sole issue to be the interpretation of the phrase "habitually used . . . in this State" found in §56-524(5) of the Code of Virginia. 226 Va. at 356, 358, 309 S.E.2d at 593-94. (App. at I-7 to -8, -15 to -16.) All cars habitually used in Virginia are subject to the rolling stock tax. In reviewing the evolution and application of that section, the Virginia

Supreme Court found reasonable, but rebuttable, the Commission's presumption that an intrastate railroad had only enough cars to render its public service within Virginia and that such a railroad habitually used all of its cars for that purpose. The Virginia Supreme Court also found that the Commission could reasonably presume that, to the extent that an intrastate railroad did not use its own cars, it employed other railroads' cars which were, in effect, substitutes. Id. at 359, 309 S.E.2d at 595. (App. at I-20.)

According to the opinion, the Commission acknowledged that an intrastate railroad could rebut the presumption of habitual use in Virginia by showing that it had established a tax base for some of its cars in another jurisdiction. The

Virginia Supreme Court further concluded that the taxpayer could also rebut the presumption that all of its rolling stock is taxable by showing that the average amount of cars habitually used in Virginia, including cars owned by others, was less than the total amount of its cars. Id. at 359-360, 309 S.E.2d at 595. (App. at I-20 to -21.) The Virginia Supreme Court went on to find that the first avenue for rebutting the presumption was not open to the Railroad because none of the cars were subject to taxation outside Virginia. Id. at 360, 309 S.E.2d at 595. (App. at I-21.)

ANY FEDERAL QUESTION WAS REACHED IN WINCHESTER & WESTERN I

In considering the Railroad's appeal of the valuation of cars for rolling stock tax in Winchester & Western I, the

Virginia Supreme Court followed this Court's analysis in Central Railroad v. Pennsylvania, 370 U.S. 607, reh'g denied, 371 U.S. 856 (1962). There, the Court addressed the constitutional issues arising out of Pennsylvania's taxation of rolling stock owned by an intrastate railroad. The following portion of the Court's opinion is relevant to the case now on appeal:

> [T]angible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. If such property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as prerequisite for taxation.
>
> Accordingly, the burden is on the taxpayer who contends that some portion of its total assets are beyond the reach of the taxing power of its domicile

> to prove that the same property may be similarly taxed in other jurisdictions.

370 U.S. at 612-13 (emphasis in original; citations omitted).

To the extent that a federal question was reached by the Virginia Supreme Court in the dispute over the valuation of the Company's rolling stock on December 31, 1980, it was reached and decided in Winchester & Western I. See Central Railroad, 370 U.S. at 612-13; Northwest Airlines v. Minnesota, 322 U.S. 292, 298-300, reh'g denied, 323 U.S. 809 (1944). If the Railroad believed that the Virginia Supreme Court was in error in finding that the Railroad did not establish a tax situs for cars in other jurisdictions, it was that decision in Winchester & Western I which should have been appealed to this Court - not the decision in Winchester & Western II.

Winchester & Western I was remanded to the Commission solely to afford the Railroad an opportunity to "rebut the presumption that all its rolling stock is habitually used in Virginia by showing that the average amount habitually used, including cars of other railroads, is less than the 323 cars comprising its entire fleet. Upon such a showing, the Railway may be assessed only on the lesser amount." 226 Va. at 360, 309 S.E.2d at 595, Winchester & Western II, slip op. at 2-3. (App. at I-22 to -23, II-4 to -6.)

The remand for further proceedings on the question of state law, rebutting the presumption of habitual use, did not bar an appeal of Winchester & Western I. This Court has held that where further proceedings in the state courts are

directed, but where the federal issue is conclusive or will survive regardless of the outcome, the case is appropriate for appeal. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-84 (1975). The case at bar fits into the third category described in Cox as follows:

> In the third category are those where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

Id. at 481.

Like the third category described in Cox, the result of this case on remand was not foreordained. The Railroad

might have presented evidence pertaining to its operations and car usage which would be found by the Commission to be sufficient to rebut the presumption of taxability of all cars, and any federal question would have been moot. In fact, the Commission found on remand that the Railroad did not carry its burden of persuasion, and the original valuation was upheld. The appeal of this second decision to the Virginia Supreme Court was limited to a review of the Commission's finding that the presumption was not rebutted. As described in Cox, the Railroad could not again raise the federal question of foreign tax situs.

The case also meets some of the conditions identified in the fourth category described in Cox as follows:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83.

To the extent that a federal question was raised in the Virginia proceedings, it was addressed and disposed of by the Virginia Supreme Court in Winchester &

Western I. If this Court had determined on the appeal of that first appellate decision that a federal question had been wrongly decided by the Virginia Supreme Court, further litigation would have been precluded or, at the very least, materially affected.

Under the Cox holdings then, the final decision of the Virginia Supreme Court in Winchester & Western I disposed of all federal questions raised by Railroad and was appropriate for appeal notwithstanding the additional Virginia proceedings. The Railroad, however, did not exercise its right of appeal at that point, but waited until Winchester & Western II was decided.

THE DECISION ON APPEAL IS ADEQUATELY SUPPORTED BY STATE LAW

If a federal question was raised in Winchester & Western II, the Virginia

Supreme Court did not reach it in the decision now on appeal. The memorandum opinion supports no argument that the Virginia Supreme Court did more than affirm the Commission's decision on an issue of fact. There was an adequate basis in state law for the Virginia Supreme Court to affirm the Commission.

This Court has deferred to the interpretations of state tax law by the state's highest court. United Air Lines v. Mahin, 410 U.S. 623, 629 (1973). Further, this Court has long held that its powers on appeal of a state court decision do not extend beyond federal questions, and that review was not appropriate when an adequate state ground for a decision appears on the record. Herb v. Pitcairn, 324 U.S. 117, 125-26, 128 (1945).

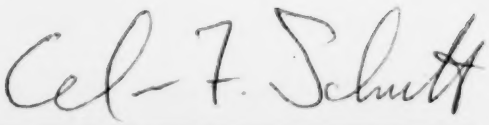
CONCLUSION

The decision on appeal, Winchester & Western II, concerned only the factual question of rebutting a presumption of taxability by production of sufficient evidence. In affirming the Commission by memorandum opinion, the Virginia Supreme Court found that the Commission properly applied Virginia law. The record does not show that the appellate court reached any federal question in affirming the Commission.

To the extent that a federal question was raised by the Railroad before the Virginia Supreme Court, it was disposed of in Winchester & Western I, not the case on appeal. Consequently, the Railroad's jurisdictional statement fails to satisfy the requirements of Rule 16.1, and Appellees Commonwealth of

Virginia and Virginia State Corporation Commission move that this appeal be dismissed.

Dated: December 31, 1986



William Frederick Schutt
Associate General Counsel
Virginia State Corporation
Corporation

Lewis S. Minter, General Counsel
William F. Schutt
Wayne N. Smith
Office of General Counsel
Virginia State Corporation Commission
P.O. Box 1197
Richmond, Virginia 23209
(804) 786-8671

Mary Sue Terry
Attorney General of Virginia
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219

AFFIDAVIT OF SERVICE BY MAIL

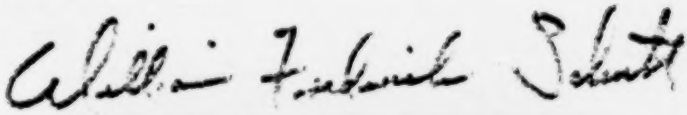
I, William Frederick Schutt, one of the attorneys for the Virginia State Corporation Commission, Appellee in this case, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of December, 1986, I deposited in a United States Post Office located at 10th and Main Streets, Richmond, Virginia, with first-class postage prepaid and proper address, to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Motion to Dismiss.

I further certify that on the 31st day of December, 1986, I deposited in a United States Post Office located at 10th and Main Streets, Richmond, Virginia with first-class postage prepaid and

properly addressed copies of the foregoing Motion to Dismiss to Flournoy L. Largent, Jr., Esquire, P.O. Box 808, Winchester, Virginia 22601, counsel for Appellant, Winchester and Western Railroad Company.

I further certify that on the 31st day of December, 1986, I delivered three (3) copies of the foregoing Motion to Dismiss to the Honorable Mary Sue Terry, Attorney General of Virginia, 101 North 8th Street, Richmond, Virginia 23219.

All parties required to be served have been served.



William Frederick Schutt
Associate General Counsel
Virginia State Corporation Commission
Counsel of Record

APPENDIX

I

Winchester & W. R.R. v. Virginia,

226 Va. 352, 309 S.E.2d 590 (1983)

"Winchester & Western I"

WINCHESTER AND WESTERN RAILROAD COMPANY

v.

COMMONWEALTH OF VIRGINIA, et al.

Record No. 830492.

Supreme Court of Virginia

Dec. 2, 1983.

Before CARRICO, C.J., AND COCHRAN, POFF, COMPTON, STEPHENSON, RUSSELL and THOMAS, JJ.

COCHRAN, Justice.

Pursuant to Code Sec. 58-672, Winchester and Western Railroad Company (the Railway) filed its application with the State Corporation Commission for review and correction of an assessment for taxation of rolling stock as of December 31, 1980. After the Commission denied the application

except for a minor adjustment in the assessment, the Railway filed its petition for appeal against the Commonwealth and the Commission.

Findings of fact, made by the Hearing Examiner and approved by the Commission, are not in dispute. The Railway, a Virginia corporation, operates a railroad located entirely within the boundaries of the Commonwealth; its track extends a distance of 18 miles from Gore to Winchester. The Railway is a wholly-owned subsidiary of Unimin Corporation, which ships sand from its Virginia plant at Gore and from its plants in other states. Prior to 1980, the Railway acquired by long-term lease its entire fleet of 325 freight cars, all of which bore the Railway's

markings during 1980. Of the 325 cars, 209 were never used in Virginia in 1980, 42 were used for not more than two months, 14 for two to six months, and 60 for more than six months. Two of the cars used in Virginia for less than six months were destroyed before December 31, 1980. None of the 325 cars was subject to taxation for 1980 in any state other than Virginia; the Commission assessed all the cars for taxation in Virginia for that year. The Commission did not assess other cars the Railway used in Virginia which did not bear the Railway's markings.

The Hearing Examiner concluded that assessment of 323 cars owned or operated by the Railway on December 31, 1980, was proper. After hearing argument on the Railway's exceptions to

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the Hearing Examiner's report, the Commission, by opinion and order entered January 21, 1983, one member dissenting, approved the assessment of 323 cars. The Commission reduced the total assessment, however, from $9,876,122 to $9,818,128, by deleting the assessed value of the two destroyed cars.

The assessment of rolling stock, mandated by Code Sec. 58-529 (Repl.Vol.1974), is based upon the annual report required by Code Sec. 58-524 (Repl.Vol.1974), which provides in pertinent part as follows:

> Every railway company doing business in this State shall report on or before the fifteenth day of April, to the State Corporation Commission, its real and tangible personal property of every description as of the thirty-first day of December preceding, the fair cash value thereof, and the

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> county, city, town or magisterial district in which it is located ....
>
> The report shall classify such property under the following heads:
>
> * * * * * *
>
> (5) Rolling stock, which shall include all locomotives, of whatever motive power, autocars, cars of every kind and description, and all other equipment which it is reasonably proper to class as rolling stock; provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State;
>
> * * * * * *

The Railway argues, as it did before the Commission, that this statutory language is clear and controlling and that it limits the assessment of rolling stock to the 60 cars used for six months or more in Virginia in 1980. These were the only

cars, the Railway says, that were "habitually used" in Virginia within the meaning of the statute.

The Commission relies upon its long-standing methodology for determining the rolling stock assessable for taxation in Virginia. By Administrative Order entered May 25, 1928, the Commission established the method for determining such assessable rolling stock. As to freight cars, the order provided in pertinent part as follows:

> (a) All freight train cars (except caboose cars) shall be apportioned, apportioning to the State of Virginia that proportion which the car miles made by such equipment in Virginia is of the car miles made by such equipment on the entire system.

Using that methodology, the Commission's opinion stated that the Railway, operating only in Virginia, could only report intrastate car miles; therefore, the percentage to be applied to the rolling stock was 100%.

The Railway contends that the 1972 amendment to Code Sec. 58-524 (Acts 1972, c. 813) changed the applicable law; for the first time, the law put intrastate railroads on the same basis as interstate railroads, which could be taxed only on rolling stock "habitually used" in Virginia. The Commission concedes that the amendment requires that the "habitually used" provision be applied to all railroads subject to the tax, but it asserts that the amendment was not intended to change the law pertaining to taxation of rolling

stock. Since the 1972 amendment became effective, the Commission says, the same methodology used since 1928 has been followed consistently without interruption and without objection by any railroad until the Railway initiated this proceeding. The Commission argues that it has properly determined the Railway's rolling stock "habitually used" in Virginia by using the apportionment formula based on car miles.

The Commission frames the first question on appeal to be whether Virginia can tax all the rolling stock of a railroad which is domiciled and operated solely in Virginia even though some of the railroad's rolling stock never enters the State, or does so only sporadically. This question must be

answered in the affirmative, the Commission says, except for rolling stock for which the railroad has established another tax situs. The Railway, while conceding that Virginia properly imposed such a tax for many years, views the crucial issue to be whether Code Sec. 58-524, as amended in 1972, authorizes Virginia to tax all the Railway's rolling stock, wherever used. We agree that resolution of this appeal turns not upon what Virginia has the right to tax but upon what it has elected to tax under the statute. To determine the legislative intent we will review briefly the history of the taxation of rolling stock in Virginia.

An early statute required every "railroad and canal company not exempted from taxation by virtue of its

charter" to report annually its real and personal property, including rolling stock. Acts 1881-82, c. 119. In Marye v. Baltimore and Ohio Railway, 127 U.S. 117, 8 S.Ct. 1037, 32 L.Ed. 94 (1888), the United States Supreme Court reviewed this statute. The Baltimore and Ohio Railway (B. & O.) was incorporated in Maryland; under its charter its rolling stock was exempt from taxation. The B. & O. had no track in Virginia, but it connected with certain railroads incorporated in Virginia and operated these roads under leases or contracts, using its own rolling stock for the purpose. No rolling stock was permanently set apart for use on these lines. Virginia assessed a tax on the rolling stock of the B. & O. used on these Virginia

railroads and attempted to collect by distraint. A Federal court in Virginia enjoined the collection, and an appeal to the Supreme Court followed. Virginia argues that the tax was assessed only on rolling stock in "constant use" in Virginia. The B. & O. argued that without legislation to the contrary, the tax situs of its personal property was in Maryland, the B. & O.'s place of domicile.

In upholding the injunction, the Supreme Court ruled that the statute applied only to domestic corporations in Virginia. In dicta, however, the Court's opinion stated that if Virginia permitted the B. & O. to bring rolling stock into Virginia "habitually to use" it therein, Virginia could by statute tax such rolling stock even if the

individual items were constantly changing. In such cases, the opinion volunteered, "the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used ...." Id. at 123-24, 8 S.Ct. at 1040.

It appears this suggestion prompted the General Assembly to enact a statute requiring "[e]very railroad and canal company of this state not exempted from taxation by virtue of its charter" and every such company incorporated under the laws of another State and doing business in Virginia to report and pay taxes on its real and personal property. Acts 1891-92, c. 254, p. 429. Included under paragraph "Fourth" to be reported was rolling stock, "provided, that the rolling stock of

foreign corporations doing business in this state shall be assessed on the average amount of such property habitually used in this state." Id.

Until 1972, this proviso, without substantial change in language, remained in the statute providing for assessment of rolling stock. See Acts 1906, c. 300; Acts 1910, c. 281; Acts 1912, c. 214; Acts 1915, c. 141; Code of 1919 Tax Bill Sec. 27; Acts 1926, c. 358; Acts 1927, c. 111; Acts 1928, c. 45, p. 142; Tax Code Sec. 215 (1936); and Code of 1950 Sec. 58-524(5).

From 1915 to 1936, another statute required the Commission to assess annually the rolling stock of all corporations operating railroads and doing business in Virginia "so far as the same is taxable in this State."

Acts 1915, c. 80, p. 112; Code of 1919 Sec. 2207; Acts 1926, c. 576, pp. 956-57. The statute was repealed by Tax Code Sec. 436 (1936); subsequently, the Commission's duties in the assessment of rolling stock were included in Sec. 215 of the 1936 Tax Code, then in Secs. 58-524 et seq. of the 1950 Code. The language "so far as the same is taxable in this State" was eliminated.

The 1972 amendment to Sec. 58-524 (Acts 1972, c. 813) requires "[e]very railway company doing business in this State" to report its real and tangible personal property. References to canal corporations, to corporations of Virginia not exempt from taxation by their charters, and to foreign corporations doing business in Virginia

were deleted. The amendment to the proviso in Sec. 58-524(5) applying to rolling stock deleted the words "foreign railway and canal corporations doing business in this State" and replaced them with the word "they," which apparently refers to every railway company doing business in Virginia. The proviso now reads "provided, that they shall report and be assessed on the average amount of rolling stock habitually used by them in this State."

It is clear, as the Commission concedes, that the amended proviso applies to railroads operating exclusively within Virginia as well as to those operating both within and without the State. Thus, all railroads operating in whole or in part in

Virginia are assessable for taxation on rolling stock "habitually used" in Virginia.

The Commission says that there has been no change in its methodology for assessing rolling stock since 1928 and that the 1972 amendment did not make any substantive change in the law. Under Sec. 163 of the 1902 Constitution, the Commission notes, foreign corporations were prohibited from performing public service business in Virginia except for those foreign corporations engaged in such business on the effective date of the Constitution. Under Article IX, Sec. 5 of the 1971 Constitution, the prohibition was restated without a "grandfather" exception. Therefore, the Commission says, deletion by the

1972 amendment to Code Sec. 58-524(5) of the references to foreign corporations doing railroad or canal business in Virginia merely eliminated obsolete surplusage because there were at that time no such corporations.

Before the 1972 amendment, Code Sec. 58-524 and predecessor statutes provided for taxation of all the rolling stock of Virginia railroads, while providing for taxation of only the rolling stock "habitually used" in Virginia by foreign railroad companies. There was no express statutory authority, therefore, to assess only the rolling stock "habitually used" in Virginia by Virginia railroad companies engaged in multistate operations. Nevertheless, as the Commission says, there have

always been constitutional restrictions on the taxation of multistate operations. The 1928 administrative order recognized these limitations by providing an apportionment process for determining the Virginia assessment of rolling stock of all railroad companies, domestic as well as foreign, which operate both in Virginia and elsewhere. Whether necessary or not, since 1928 the Commission has also used the same methodology for determining the assessment of the rolling stock of intrastate railroads. Thus, since 1928 the Commission has been assessing all railroad rolling stock "habitually used" in Virginia as determined by the percentage of car miles (or in certain instances track miles) in Virginia to total car miles throughout the

railroad's system. In the present case, this results in assessment of all the Railway's rolling stock.

Tax statutes are to be construed strictly against the taxing authority. Com. Nat. Resources v. Commonwealth, 219 Va. 529, 537, 248 S.E.2d. 791, 796 (1978). The construction of a tax statute by the taxing authority, however, is entitled to great weight. Webster v. Department of Taxation, 219 Va. 81, 84-85, 245 S.E.2d 252, 255 (1978). This is especially true where, as in the present case, there has been widespread acquiescence in the construction.

There is a basic presumption, the Commission argues, that an intrastate railroad has only enough cars to render its public service in Virginia and that

it is habitually using all its own cars for that purpose. We agree that this is a reasonable presumption. We also agree that the Commission may reasonably presume that to the extent an intrastate railroad does not use its own cars in Virginia, it uses cars of other railroads which are in effect substitutes for its own. The presumptions, however, are rebuttable. Perhaps, as the Commission maintains, there was no legislative intent to change the substantive law by the 1972 amendment to the statute. Nevertheless, in its present form, the statute, regardless of intent, unequivocally mandates assessment on the average amount of rolling stock habitually used in Virginia, and the statute is controlling. However

reasonable may be the Commission's presumptions, they may be rebutted when the assessment is challenged.

As the Commission concedes, an intrastate railroad may rebut the presumption that all its cars are habitually used in Virginia by showing that some have established a tax base elsewhere. This rebuttable evidence is not available in the present case because none of the Railway's cars is subject to taxation outside Virginia. We conclude that an intrastate railroad may also rebut the presumption by showing that the average amount of rolling stock habitually used by it in Virginia, including cars of other railroads, is less than the total amount of its rolling stock.

We reject the Railway's contention that only its rolling stock used in Virginia for at least six months during the tax year was "habitually used" within the meaning of the statute. The word "habitually" has been defined as "customarily." Black's Law Dictionary, 640 (rev. 5th ed. 1979). Freight cars might be customarily used in Virginia for only a brief period of time within the tax year, far less than six or even two months. The Commission is uniquely qualified to make this determination in evaluating the relevant evidence.

We hold that the Railway may rebut the presumption that all its rolling stock is habitually used in Virginia by showing that the average amount habitually used, including cars of other railroads, is less than the 323

cars comprising its entire fleet. Upon such a showing, the Railway may be assessed only on the lesser amount.

We will reverse the order of the Commission and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

II

Winchester & W. R.R. v. Commonwealth,

No. 860005 (Va. Sup. Ct. Sept. 5, 1986)

(mem.)

"Winchester & Western II"

SUPREME COURT OF VIRGINIA

Present: All the Justices

WINCHESTER AND WESTERN
RAILROAD COMPANY

v. Record No. 860055

COMMONWEALTH OF VIRGINIA AND
STATE CORPORATION COMMISSION

MEMORANDUM
OPINION*
9-5-86

FROM THE STATE CORPORATION
COMMISSION OF VIRGINIA

This case is before the Court for a second time on Winchester and Western Railroad Company's (the Railway) appeal of right from an adverse ruling by the State Corporation Commission concerning the December 31, 1980 assessment of the

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*This opinion is not for publication and is not to be cited or relied upon as precedent in the future.

Railway's rolling stock. We first considered this dispute in W. & W. Ry. Co. v. Commonwealth, 226 Va. 352, 309 S.E.2d 590 (1983).

The facts are the same. The Railway is a Virginia corporation. All of its 18 miles of track lie in Virginia between Gore and Winchester. In 1980, the Railway owned or leased 325 rail cars, none of which was subject to taxation in any state other than Virginia, 42 were used for not more than two months, 14 were used from two to six months, and 60 were used for more than six months. Further, two cars were destroyed prior to December 31, 1980. The Commission assessed 323 cars at $9,818,128.

In the first appeal, the Railway contended that the Commission assessed

more cars than it should have. According to the Railway, it could be taxed only on rail cars habitually used in Virginia and only the 60 rail cars used for more than six months so qualified. The Commission arrived at the number of rail cars to be assessed by applying a presumption to the effect than "an intrastate railroad has only enough cars to render its public service in Virginia and that it is habitually using all its own cars for that purpose." 226 Va. at 359, 309 S.E.2d at 595.

In the first appeal, we rejected the Railway's approach to determining which cars were habitually used in the Commonwealth. Further, we upheld the presumption relied upon by the Commission. However, we said that

presumption was rebuttable.

We stated that the presumption could be rebutted in only two ways: first, by showing that the rail cars had established a tax base elsewhere; second, "by showing that the average amount of rolling stock habitually used by [the Railway] in Virginia, including cars of other railroads, [was] less than the total amount of its rolling stock." Id. at 360, 309 S.E.2d at 595. With regard to the first method of rebutting the presumption, we said it could not be relied on in the instant case because it was plain from the record that none of the Railway's cars was subject to taxation outside Virginia. Consequently, we remanded the case for the sole purpose of permitting the Railway to attempt to

rebut the presumption by using the second alternative set forth above.

On remand, the Railway sought to rebut the presumption relied upon by the Commission by advancing two calculations which purportedly showed that the number of cars habitually used in Virginia was less than 323. The Commission rejected the calculations advanced by the railroad on the grounds that they were either the product of faulty reasoning or that they did not consider all the facts. It would serve no useful purpose to restate here the analysis made by the Commission. Suffice it to say that upon our review of the record, we conclude that the Commission correctly ruled that the Railway failed to rebut the presumption. Therefore, we will affirm

the Commission's decision.

Affirmed.

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-950

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WINCHESTER AND WESTERN
RAILROAD COMPANY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA and
VIRGINIA STATE CORPORATION COMMISSION,
DIVISION OF PUBLIC SERVICE TAXATION,

Appellees.

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPREME COURT
OF VIRGINIA

Flournoy L. Largent, Jr.
Attorney at Law
Post Office Box 808
Winchester, Virginia 22601
(703) 665-4378

Counsel for Appellant

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ARGUMENT

Appellees, in their motion to dismiss in No. 86-950, rely on two arguments. First, they contend that the earlier decision of the Supreme Court of Virginia in this case, Winchester & Western Railroad v. Commonwealth, 226 Va. 352, 309 S.E.2d 590, Jurisdictional Statement Appendix p. 27a (1983) (hereinafter cited as Winchester & Western I), was appealable to this Court under 28 U.S.C. Section 1257. Appellees then contend that the finality they confer to Winchester & Western I for purposes of 28 U.S.C. Section 1257 precludes Appellant from now appealing to this Court after the remand of this case pursuant to Winchester & Western I,

and the subsequent appeal and opinion by the Supreme Court of Virginia in Winchester & Western Railroad v. Commonwealth, No. 860055 (Va. Sup. Ct. Sept. 5, 1986) (mem.), Jurisdictional Statement Appendix p. 27a (hereinafter cited as Winchester & Western II).

Second, Appellees contend that if a federal question was raised in Winchester & Western II, the decision was supported on adequate independent state law grounds, thus precluding review by this Court.

Appellant believes that jurisdiction under 28 U.S.C. Section 1257 is properly invoked, and that the state court decision in this case is not supported by adequate independent state grounds.

JURISDICTION WAS PROPERLY INVOKED

The most instructive case in considering when a final judgment concerning a federal issue has been rendered for purposes of 28 U.S.C. Section 1257 is Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-85 (1975). In Cox this Court identified four categories of cases in which this Court has accepted jurisdiction, notwithstanding the existence of further proceedings to come in state courts. Since Appellant was not precluded by applicable state law from obtaining consideration of the Constitutional issues in Winchester & Western II, if this case were arguably to fit into any of those four

categories, it would be the fourth category, which is:

> [T]hose situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the revelant cause of action rather than merely controlling the nature and character of, or determing the admisability of evidence in, the state court proceedings still to come.

Id. at 482-83.

This Court went on to say:

> In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 483.

Subsequently, this Court has made clear that the exception permitting review before completion of state court proceedings is a limited one, explaining:

> Consistent with the relevant jurisdictional statute, 28 U.S.C. Section 1257, the Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-77 (1975). In general, the final-judgment rule has been interpreted "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

Flynt v. Ohio, 251 U.S. 619, 620 (1981).

The present case does not fit into the exception defined in Cox for two reasons, and must therefore meet the general finality rule stated in Flynt, supra. First, the decision in Winchester & Western I would not have been appealable to this Court because reversal of the state court on the federal issue would not have been "preclusive of any further litigation on the relevant cause of action." Cox, supra, at 482-83. No state tribunal had yet (or has yet) made a finding of fact as to the precise number of rail cars which could Constitutionally have been taxed in jurisdictions other than Virginia, thus rendering them non-taxable in Virginia. Second, a

refusal to immediately review the decision in Winchester & Western I could not have seriously eroded federal policy. This Court's early intervention in a case involving the Constitutionality of a state taxing statute does not have the immediacy of the first amendment considerations which this Court has often treated. Cox, supra; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971). Therefore, none of the requirements set forth in Cox for accepting jurisdiction in this Court before completion of the case applied to this case after the Supreme Court of Virginia rendered its decision in Winchester & Western I.

Even assuming for purposes of argument that the order and opinion of Winchester & Western I could have been appealed directly to this Court, neither the Cox decision nor any other decision of this Court holds that an appellant will be barred from taking an appeal when the case has in fact ended in accordance with the traditional notions of finality. While this "Court has, . . . in certain circumstances, treated state-court judgments as final for jurisdictional purposes although there were further proceedings in state court" Flynt v. Ohio, supra, at 620-21, it would be a great hardship on litigants if this Court were to decide that litigants whose counsel did not correctly detect those "certain circumstances" would be precluded from

appealing to this Court after "final judgments or decrees rendered by the highest court of a State" under 28 U.S.C. Section 1257 in accordance with traditional notions of finality. If the appellant in Cox had proceeded with the remand ordered by the Georgia Supreme Court, lost the case on remand, and then lost the case on subsequent appeal to the Georgia Supreme Court, would it have been denied the right to appeal to this Court? If the appellant in Organization For A Better Austin, supra, had litigated further and then appealed a permanent injunction enjoining it from passing out leaflets of any kind, would it have lost its right to appeal for failing to appeal after the issuance of the temporary injunction? Appellant believes not.

If this Court determines that Winchester & Western I was final within the meaning of 28 U.S.C. 1257, this Court will encourage numerous premature appeals if it also determines that the only final decision from which an appeal may be taken is the earliest decision which presents those "certain circumstances" recognized by this Court.

THERE WAS NO ADEQUATE INDEPENDENT BASIS IN STATE LAW FOR THE DECISION BELOW

Appellees content that there was an adequate basis in state law for the decision in Winchester & Western II. Appellant assumes Appellees mean an adequate independent basis in state

law. Even assuming incorrectly, as they do, that Winchester & Western II is a separate case from Winchester & Western I, there cannot be an adequate independent basis in state law for upholding a statute which, as applied, is repugnant to the Constitution of the United States.

Appellees argue that the Supreme Court of Virginia had the right to interpret state tax law in a fashion which rendered all 323 of Appellant's cars as taxable, and Appellant readily agrees that state courts have authority to interpret state statutes. However, Appellees have confused the issue of a state court's right to interpret state laws with the existence of an adequate independent basis in state law for the decision reached.

Since a final judgment by the highest state court has been issued, Appellant now concurs that under state law all 323 cars are considered taxable; but this matter of statutory interpretation is in no way an adequate independent basis in state law for holding that this Court has no right to review a Constitutionally impermissible taxing statute.

CONCLUSION

Appellant did not have the right to appeal this case to this Court until the rendering of the opinion in Winchester & Western II. Assuming, for purposes of argument, that Appellant had the right to appeal to this Court

following the opinion in Winchester & Western I, Appellant nevertheless again has the right to appeal to this Court after the decision in Winchester & Western II. Therefore, in any case, this appeal is properly taken.

Respectfully submitted,

FLOURNOY L. LARGENT, JR.
Post Office Box 808
Winchester, VA 22601
(703) 655-4378
Counsel for Appellant

January 12, 1987

C E R T I F I C A T E

I do hereby certify that true and correct copies of the Appellant's Reply Memorandum were mailed to Mary Sue Terry, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia 23219; Kenneth W. Thornson, Esquire, Assistant Attorney General, Supreme Court Building, Richmond Virginia 23219; Lewis S. Minter, Esquire, State Corporation Commission, P.O. Box 1197, Richmond, Virginia 23209; and William F. Schutt, Esquire, State Corporation Commission, P.O. Box 1197, Richmond, Virginia 23209, in accordance with the rules of the

Supreme Court of the United States,
this 15th day of January, 1987.

Flournoy L. Largent Jr.
Flournoy L. Largent, Jr.